Committee on Rules
of
Practice and Procedure

Washington, D.C.
June 10-11, 2002

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 10-11, 2002

1. Opening Remarks of the Chair

   - Supreme Court action on proposed rules amendments, including rejection of amendments to Criminal Rule 26(b)

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

3. Report of the Administrative Office

   A. Legislative report
   B. Administrative report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

6. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Approving publication for public comment proposed comprehensive revision of Rules Governing § 2254 and § 2255 Proceedings and accompanying forms and proposed amendments to Rule 41
   B. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules (separate book)

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 23, 51, 53, 54, and 71
   B. **ACTION** — Considering policy on class-action minimal-diversity legislative approach
   C. Minutes and other informational items

8. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rule 608
   B. **ACTION** — Approving publication for public comment proposed amendments to Rule 804
   C. Minutes and other informational items

9. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 1005, 1007, 2002, 2003, 2009, 2016, proposed new Rule 7007.1, and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, 17, and 19
   B. **ACTION** — Approving publication for public comment proposed amendments to Rule 9014
   C. Minutes and other informational items

10. Status Report on Local Rules Project

11. Report of Technology Subcommittee

12. Status Report on Attorney Conduct Rules (oral report)

13. Long-Range Planning

14. Next Committee Meeting (Phoenix, Arizona, January 16-17, 2003)

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CHAMBERS OF
THE CHIEF JUSTICE

April 29, 2002

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Court did not approve the addition of a new Rule 26(b) as proposed by the Judicial Conference. Justice Breyer has issued a dissenting statement, in which Justice O'Connor joins. Justice Scalia has issued a separate statement.

Sincerely,

William H. Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 2002

Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

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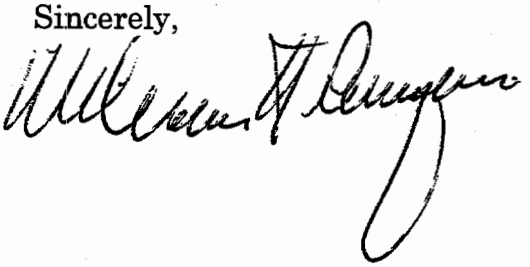
Sincerely,



APR 2 9 2002

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1 through 60.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO RULE 26(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

[April 29, 2002]

JUSTICE SCALIA filed a statement.

I share the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation.

In *Maryland* v. *Craig*, 497 U. S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is "necessary to further an important public policy," *id.*, at 850, and only "where there is a case-specific finding of [such] necessity," *id.*, at 857–858 (internal quotation marks omitted). The Court allowed the witness in that case to testify via one-way video transmission because doing so had been found "necessary to protect a child witness from trauma." *Id.*, at 857. The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy." To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Fed. Rule Crim. Proc. 15. Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, p. 54. Indeed, even this showing is not necessary: the Committee says that video transmission may be used generally as an alternative to depositions. *Id.*, at 57.

This is unquestionably contrary to the rule enunciated in *Craig*. The Committee reasoned, however, that "the use

of a two-way transmission made it unnecessary to apply the *Craig* standard." *Id.*, at 55 (citing *United States* v. *Gigante*, 166 F. 3d 75, 81 (CA2 1999) ("Because Judge Weinstein employed a two-way system that preserved . . . face-to-face confrontation . . . , it is not necessary to enforce the *Craig* standard in this case"), cert. denied, 528 U. S. 1114 (2000)). I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, *supra*, at 846–847, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

The Committee argues that the proposal is constitutional because it allows video transmission only where depositions of unavailable witnesses may be read into evidence pursuant to Rule 15. This argument suffers from two shortcomings. First, it ignores the fact that the constitutional test we applied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements. *White* v. *Illinois*, 502 U. S. 346, 358 (1992) ("There is thus no basis for importing the 'necessity requirement' announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule"). Second, it ignores the fact that Rule 15 accords the defendant a right to face-to-face confrontation during the deposition. Fed. Rule Crim. Proc. 15(b) ("The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at

the examination and keep the defendant in the presence of the witness during the examination . . .").

JUSTICE BREYER says that our refusal to transmit "denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology . . . that will help to create trial procedures that are both more efficient and more fair." *Post,* at 3. This is an exaggeration for two reasons: First, because Congress is free to adopt the proposal despite our action. And second, because nothing prevents a defendant who believes this procedure is "more efficient and more fair" from voluntarily waiving his right of confrontation.* The only issue here is whether he can be *compelled* to hazard his life, liberty, or property in a criminal teletrial.

Finally, I disagree with JUSTICE BREYER's belief that we should forward this proposal despite our constitutional doubts, so that we can "later consider fully any constitutional problem when the Rule is applied in an individual case." *Post,* at 2. I see no more reason for us to forward a proposal that we believe to be of dubious constitutionality than there would be for the Conference to make a proposal that it believed to be of dubious constitutionality. We do not live under a system in which the motto for legislation is "anything goes, and litigation will correct our constitutional mistakes." It seems to me that among the reasons Congress has asked us to vet the Conference's proposals—indeed, perhaps *foremost* among those reasons—is to provide some assurance that the proposals do not raise seri-

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*JUSTICE BREYER's assertion to the contrary notwithstanding, existing Fed. Rule Crim. Proc. 26 does not prohibit the use of video transmission by consent. *United States* v. *Mezzanatto,* 513 U. S. 196, 201 (1995) ("The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable [unless] an express waiver clause . . . suggest[s] that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances").

ous constitutional doubts. Congress is of course not bound to accept our judgment, and may adopt the proposed Rule 26(b) if it wishes. But I think we deprive it of the advice it has sought (in this area peculiarly within judicial competence) if we pass along recommendations that we believe to be constitutionally doubtful.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, filed a dissenting statement.

I would transmit to Congress the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b), authorizing the use of two-way video transmissions in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable." The Rules Committee intentionally designed the proposed Rule with its three restrictions to parallel circumstances in which federal courts are authorized now to admit depositions in criminal cases. See Fed. Rule Crim. Proc. 15. Indeed, the Committee states that its proposal permits "use of video transmission of testimony only in those instances when deposition testimony could be used." Advisory Committee Notes on Fed. Rule Crim. Proc. 26, p. 53. See Appendix, *infra*, at 5.

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where an absent witness' testimony could be admitted in nonvisual form via deposition regardless. And where the defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply.

JUSTICE SCALIA believes that the present proposal does

not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland* v. *Craig,* 497 U. S. 836 (1990). I read the Committee's discussion differently than does JUSTICE SCALIA, and I attach a copy of the Committee's discussion so that the reader can form an independent judgment. In its five pages of explanation, the Committee refers to *Maryland* v. *Craig* five times. It begins by stating that "arguably" its test is "at least as stringent as the standard set out in [that case]." It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig,* and it refers to the two relevant Court of Appeals decisions, both of which have so held. See *United States* v. *Gigante,* 166 F. 3d 75 (CA2 1999), cert. denied, 528 U. S. 1114 (2000); *Harrell* v. *Butterworth,* 251 F. 3d 926 (CA11 2001), cert. denied, 535 U. S. ____ (2002). Given the Committee's discussion of the matter, its logic, the legal authority to which it refers, and the absence of any dissenting views, I believe that any constitutional problems will arise, if at all, only in a limited subset of cases. And, in any event, I would not overturn the unanimous views of the Rules Committee and the Judicial Conference of the United States without a clearer understanding of just why their conclusion is wrong. Cf. Statement of Justice White, 507 U. S. 1091, 1095 (1993) (The Court's role ordinarily "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity").

To transmit the proposed Rule to Congress is not equivalent to upholding the proposed Rule as constitutional. Were the proposal to become law, the Court could later consider fully any constitutional problem when the Rule is applied in an individual case. At that point the Court would have the benefit of the full argument that now is lacking. At the same time, that approach would

permit application of the proposed Rule in those cases in which application is clearly constitutional. And, while JUSTICE SCALIA is correct that Congress is free to consider the matter more deeply and to adopt the proposal despite our action, the Court's refusal to transmit the proposed Rule makes full consideration of the constitutional arguments much less likely.

Without the proposed Rule, not only prosecutors but also defendants, will find it difficult, if not impossible, to secure necessary out-of-court testimony via two-way video—JUSTICE SCALIA's statement to the contrary notwithstanding. Cf. *ante*, at 3. Without proposed Rule 26(b), some courts may conclude that other Rules prohibit its use. See, *e.g.*, Fed. Rule Crim. Proc. 26 (testimony must "be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence or other Rules adopted by the Supreme Court"). Others may hesitate to rely on highly general and uncertain sources of legal authority. Cf. *United States* v. *Gigante*, 971 F. Supp. 755, 758–759 (EDNY 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Fed. Rules Crim. Proc. 2 and 57(b)); *United States* v. *Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 43 (Mass. 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ied] it to the advantages of video teleconferencing"). Thus, rather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology. And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.

I consequently dissent from the Court's decision not to transmit the proposed Rule.

APPENDIX TO STATEMENT OF BREYER, J.

Rule 26. Taking Testimony

(a) In General. In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§2072–2077.

(b) Transmitting Testimony from a Different Location. In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes exceptional circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be con-

sidered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. *See, e.g., United States v. Salim*, 855 F. 2d 944, 947–948 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address

possible concerns about the Confrontation Clause rights of a defendant. First, under the rule, the court is authorized to use "contemporaneous two-way" video transmission of testimony. Thus, this rule envisions procedures and techniques very different from those used in *Maryland* v. *Craig,* 497 U. S. 836 (1990) (transmission of one-way closed circuit television of child's testimony). Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are "exceptional circumstances" for using video transmissions, a standard used in *United States* v. *Gigante,* 166 F. 3d 75, 81 (2d Cir.), cert. denied, 528 U. S. 1114 (1999). While it is difficult to catalog examples of circumstances considered to be "exceptional," the inability of the defendant and the defense counsel to be at the witness's location would normally be an exceptional circumstance. Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland* v. *Craig,* 497 U. S. 836 (1990). In that case the Court indicated that a defendant's confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important government public policy and only where the reliability of the testimony is otherwise assured." *Craig,* 497 U. S. at 850. In *Gigante,* the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the

witness to hear and understand each other during questioning. *See, e.g., United States* v. *Gigante*, 166 F. 3d 75 (2d Cir. 1999).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable. Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante, supra,* to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission. And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant. Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed

under the rule. *See United States* v. *Gigante,* 971 F. Supp. 755, 759–760 (E.D.N.Y. 1997) (court order setting out safeguards and procedures).

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland* v. *Craig,* 497 U. S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements that underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id.,* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States* v. *Gigante, supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause); *Harrell* v. *Butterworth,* [251] F. 3d [926] (11th Cir. 2001) (remote transmission of unavailable witnesses' testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances

such as those encountered in *Craig,* it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig* is a decision left to the trial court.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause. See *Maryland* v. *Craig, supra.*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 10-11, 2002
Tucson, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona, on Thursday and Friday, January 10-11, 2002. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Judge Sidney A. Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Judge Thomas W. Thrash, Jr.
Deputy Attorney General Larry D. Thompson
Chief Justice Charles Talley Wells

Judge Michael Boudin and David M. Bernick were unable to attend the meeting.

Also participating in the meeting were four former members of the committee – Judge Alicemarie H. Stotler, Professor Geoffrey C. Hazard, Jr., Gene W. Lafitte, and Sol Schreiber — and four former advisory committee chairs — Judges Paul V. Niemeyer, Patrick E. Higginbotham, Will L. Garwood, and Fern M. Smith.

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

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Richard H. Kyle
(substituting for Judge David F. Levi, Chair)
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

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

INTRODUCTORY REMARKS

Judge Scirica introduced the new members of the committee: Chief Justice Wells, Deputy Attorney General Thompson, and Mr. Kravitz. He also thanked Judge Garwood and Mr. Lafitte, whose terms had expired, for their distinguished service to the committee and presented them with framed certificates signed by the Chief Justice. Judge Scirica pointed to Judge Garwood's highly successful chairmanship of the Advisory Committee on Appellate Rules over the last four years and his major role in restyling the appellate rules. He praised Mr. Lafitte for six years of outstanding service on the Standing Committee and his innovative leadership as chair of the Technology Subcommittee.

Judge Scirica reported that the Judicial Conference had just opened its fall meeting at the Supreme Court on September 11, 2001, when the tragic events of that day interrupted the proceedings before any official actions could be taken. He elaborated on three rules items on the September 2001 Conference agenda.

First, Judge Scirica said that he had withdrawn the proposed revisions of Bankruptcy Rule 2014, after discussion with Judge Small, when two members of the Conference's Executive Committee expressed serious reservations about them, and Conference approval of the proposals appeared to be in doubt. The withdrawn amendments would have relaxed the scope of the current requirement in Rule 2014 that a professional seeking appointment disclose to the court all connections with creditors, their attorneys, and their accountants. Judge Scirica noted that the proposal had been returned to the Advisory Committee on Bankruptcy Rules for further consideration.

Second, Judge Scirica noted that the proposed changes in the criminal rules — including both the restyling of the rules and substantive amendments — are uncontroversial. They had been placed on the Conference's consent calendar, with the exception of the video conferencing proposals, and were later approved routinely by mail ballot after the interrupted Conference meeting.

Third, Judge Scirica reported that controversy had arisen over the proposed amendments to Criminal Rules 5 and 10, which would allow a judge to conduct an initial appearance or arraignment by video conferencing upon the consent of the defendant. He pointed out that the Department of Justice strongly supports the proposal, but would prefer to have it authorize video conferencing even without the defendant's consent. On the other hand, federal defenders and the Defender Services Committee oppose video conferencing of criminal proceedings — even with consent — on the grounds that it would shift costs from the Department of Justice to the defenders' appropriation and potentially undermine the solemnity and dignity of the proceedings.

Judge Scirica reported that video conferencing is used widely in the state courts, pointing to a survey of state defenders showing general satisfaction as long as the proceedings are conducted in adequate facilities, the technology is excellent, and the defendants are able to speak with their lawyers. He added that the Advisory Committee on Criminal Rules was split on the issue of requiring the defendant's consent, but it had predicted that the proposal would not be approved by the Judicial Conference unless it contained the consent requirement.

Since the Conference had adjourned without taking any formal actions, Judge Scirica reported that the Chief Justice decided to put the video conferencing proposal to a mail vote of Conference members, rather than postpone it for discussion at the next meeting of the Conference. The members voted by mail to approve the amendments.

Judge Scirica reported that the Advisory Committee on Civil Rules had conducted a very successful two-day conference at the University of Chicago Law School in October at which prominent members of the bench, bar, and academia explored a variety of issues associated with FED. R. CIV. P. 23 and class actions. He thanked Judge David Levi, Judge Lee Rosenthal, Professor Edward Cooper, and Professor Richard Marcus for their work in planning the conference, and he urged the members to read the notes of the conference.

Judge Scirica reported that the Chicago conference participants had discussed the proposed amendments to Rule 23 published by the advisory committee in August 2001, as well as an "informal call for comments" suggesting additional Rule 23 amendments that would authorize a federal court to preclude duplicative class actions in other courts. He noted that the advisory committee had decided not to publish the additional amendments because of concerns — under both the Rules Enabling Act and the Anti-Injunction Act — as to whether injunctions against state class actions could be authorized by federal procedural rule. Nevertheless, he said, the committee wanted to obtain the views of the public on the preclusion proposals.

Judge Scirica said that most of the panelists and participants at the conference had expressed the view that duplicative and or overlapping class actions are a serious problem. Many of them, he said, had complained that some lawyers — after being denied class certification in a federal or state court — bring a series of repetitive class actions in different state courts. Nonetheless, he added, most of the participants doubted that the problems raised by duplicative class actions could be resolved exclusively through the federal rules process.

Judge Scirica said that the advisory committee is of the view that duplicative class actions raise real problems and merit a legislative solution. He noted that the Judicial Conference has taken a position against the minimal diversity bills pending in Congress. But, he said, the advisory committee would continue to explore potential legislative action, working in coordination with the Federal-State Jurisdiction Committee and other committees of the Judicial Conference.

APPROVAL OF THE MINUTES OF THE LAST MEETING

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

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office had been monitoring 22 bills pending in the 107th Congress that would impact the federal rules. He noted that the recently enacted USA PATRIOT Act had amended FED. R. CRIM. P. 6 and 41 directly by statute.

Mr. Rabiej reported that legislation was pending in the Senate to overturn the "McDade amendment" and require the Judicial Conference to recommend attorney conduct provisions to Congress. He also noted that minimal diversity class action legislation was likely to be passed by the House of Representatives, but not the Senate. The omnibus bankruptcy reform legislation, he said, had passed both houses of Congress and was still pending in conference committee. He pointed out that the Advisory Committee on Bankruptcy Rules had been very active in drafting amendments to the bankruptcy rules and forms in anticipation of possible enactment of the legislation.

Mr. Rabiej noted that the separate "style" and "substantive" packages of proposed amendments to the criminal rules, which had been approved by the Judicial Conference in October 2001, had been merged into one package and were pending before the Supreme Court.

REPORT OF THE FEDERAL JUDICIAL CENTER

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

He drew the committee's attention to three Center publications: the new Handbook on Courtroom Technology; a new guide to alternative dispute resolution; and a fourth edition of the Manual for Complex Litigation, which is still in preparation.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachment of November 30, 2001. (Agenda Item 8)

He pointed out that the advisory committee had not held a winter meeting, but an extensive package of proposed amendments to the Federal Rules of Appellate Procedure was pending in the Supreme Court, following approval by the Standing Committee in June 2001 and by the Judicial Conference in September 2001.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small presented the report of the advisory committee, as set forth in his memorandum and attachments of December 14, 2001. (Agenda Item 6)

He noted that the advisory committee's meeting of September 13, 2001 had been canceled because of the tragic events of September 11.

Judge Small reported that the advisory committee had been working diligently, with the help of a subcommittee, to draft forms to implement the omnibus bankruptcy reform legislation pending in Congress. He pointed out that the statute would become effective 180 days after enactment. Therefore, he said, the committee believed it essential to have new forms ready for Judicial Conference approval and submission to publishers of forms.

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

Judge Small said that the advisory committee had voted to seek authority to publish proposed amendments to the bankruptcy rules and forms that would limit disclosure of social security number and other identifiers to the last four digits. The amendments would implement the new privacy policy recently recommended by the Court Administration and Case Management Committee and approved by the Judicial Conference.

Judge Small pointed out that the last-four-digit proposal did not enjoy the support of every member of the advisory committee. Moreover, provisions of the Bankruptcy Code require debtors to include their social security numbers in any communications with creditors (§ 342) and document preparers to include their social security numbers on all documents (§ 110). Judge Small said that the Department of Justice and the Internal Revenue Service have serious reservations about the proposal. He added that the advisory committee would consider the matter further at its March 2002 meeting, after reviewing all the public comments, including those of DOJ and IRS. It planned to report back to the Standing Committee at the June 2002 meeting.

The committee without objection approved the proposed amendments for publication.

Judge Small noted that the advisory committee at its March 2002 meeting would further consider the proposed revision of FED. R. BANKR. P. 2014 governing disclosure responsibilities of a professional.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kyle and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachment of December 15, 2001. (Agenda Item 7)

Judge Kyle reported that the advisory committee had published proposed amendments to FED. R. CIV. P. 23 (class actions), 51 (jury instructions), and 53 (masters). He noted that the advisory committee will continue to consider what might be done to address the problem of overlapping class actions.

Professor Cooper noted that the advisory committee is considering whether problems associated with discovery of computer-based information can, or should, be addressed by amendments to the civil rules. He said that the advisory committee is concerned that any new rule addressing electronic discovery could soon become obsolete.

Professor Cooper reported that a number of participants at the University of Chicago class action conference had recommended that the advisory committee address again the issue of settlement classes. They suggested that since the *Amchem* and *Ortiz* decisions, lawyers seem to be "gun shy" about settlement classes and do not use them for fear of being overturned in the courts of appeals. He noted that the advisory committee had published a modest settlement class proposal in 1996, which was cited in the *Amchem* opinion. But, he said, the committee withdrew the proposal after publication in order to monitor the case law in the wake of *Amchem* and *Ortiz*.

Professor Cooper suggested that the advisory committee would likely address settlement classes again, but not in the coming year. He observed that practical distinctions exist among the various types of class actions. Antitrust and securities cases, for example, may have different dynamics from mass tort or consumer class actions.

One of the participants observed that the focus of class action reform appeared to have shifted over time. He noted that the advisory committee had once concentrated much of its efforts on the class certification decisions. Later, the focus shifted to settlement classes and the right of class members to opt out. Now, he said, the attention of bench and bar is directed largely to duplicative class actions. He pointed out that addressing the problems of duplicative class actions will be very difficult because of the implications of our system of dual federal and state sovereignty. He added that a legislative solution will be necessary, and Congress will appreciate the committee's advice.

Another participant urged the advisory committee to take a much broader, fresh approach to class actions. Putting aside the federal-state jurisdictional questions for the moment, he said, the committee might undertake a project to examine the development of class action suits in other countries, such as Canada, Britain, Australia, and Brazil. In the process, he said, the committee could study how those countries define classes, provide due process, and promote efficiency. He added that more attention should be devoted to examining the merits and substantive validity of individual claims. Other participants endorsed the suggestion, and Judge Scirica asked that it be brought to the attention of the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes' memorandum and attachments of December 3, 2001. (Agenda Item 8)

FED. R. CRIM. P. 6 and 41

Judge Carnes reported that the USA PATRIOT Act had directly amended FED. R. CRIM. P. 6 and 41. But the statutory amendments will be overridden by operation of law under the supersession clause of the Rules Enabling Act when the restyled criminal rules take effect on December 1, 2002. To avoid nullifying the provisions that Congress had just written, he said, the advisory committee had redrafted the two rules to conform to the language and order of the restyled rules. He noted, for example, that the language of the statute was based on the old rules, rather than the restyled rules.

Judge Carnes pointed out that the advisory committee made fewer changes in Rule 6 than the Style Subcommittee had recommended. The committee, he said, decided to err on the side of retaining the awkwardness and ambiguity of the statutory language in order to avoid the risk of making substantive changes in the legislation. He noted that the committee had resolved the statutory ambiguity as to which court law-enforcement officers must notify when they disclose grand jury information under Rule 6(e). On the other hand, he said, the committee did not attempt to resolve other ambiguities in the statute, such as clarifying the meaning of "United States person" or "protective official." He said that there were fewer problems with the statutory revision of Rule 41, and the advisory committee adopted more of the Style Subcommittee's suggestions in restyling that rule.

Judge Carnes recommended that the rules be approved by the Standing Committee and forwarded to the Judicial Conference for approval in March without publication. They would then be sent promptly to the Supreme Court for integration into the body of restyled rules pending before the Court.

One of the members asked whether Congress will be concerned about the committee "tinkering" with its language. Judge Carnes responded that the committee is being helpful to Congress, both in avoiding the supersession problem and in blending the statutory language with the language of the rest of the Federal Rules of Criminal Procedure. Judge Scirica added that the advisory committee had done the right thing, and the matter will be brought to the attention of appropriate Congressional staff.

The committee without objection approved the amended rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur presented the report of the advisory committee, as set forth in Judge Shadur's memorandum of December 1, 2001. (Agenda Item 9)

Judge Shadur reported that the advisory committee had canceled its October 2001 meeting.

He said that the committee had published proposed amendments to FED. R. EVID. 608(b) (evidence of character and conduct of a witness) and 803(b)(3) (hearsay exception for statement against interest) for public comment. But, he noted, the scheduled public hearing on the amendments had been canceled for lack of witnesses. He added that the advisory committee would consider the written public comments and address the amendments again at its April 2002 meeting.

Judge Shadur reported that he had returned the Judicial Conference questionnaire on the committee system, recommending that the Advisory Committee on Evidence Rules be continued. Judge Scirica agreed strongly with Judge Shadur's recommendation, pointing out that the evidence committee is essential to the Conference's work, especially in responding to Congressional initiatives on evidence issues.

ATTORNEY CONDUCT RULES

Judge Scirica reported that the Standing Committee had spent a great deal of time on attorney conduct issues over the last several years. He noted that the subject had come to the committee's attention originally as a byproduct of the local rules project, which had revealed that many district courts have local attorney conduct rules conflicting with those of the supreme court of their state.

He said that there is a general consensus that if the committee were to take any action regarding attorney conduct, it would be to recommend a rule of "dynamic conformity," *i.e.*,

tying attorney conduct in the federal courts to the prevailing conduct rules of each respective state. He pointed out that conduct problems attracting the most attention involve regulation of federal government attorneys — especially, but not exclusively, conflicts over Rule 4.2 of the rules of professional conduct (communications with persons represented by counsel). He noted that potential revision of Rule 4.2 has been the subject of extensive discussions, not just with the Standing Committee, but among the Department of Justice, the Conference of Chief Justices, and the American Bar Association.

Judge Scirica noted that the committee had decided in 2001 not to take any further action on possible attorney conduct rules until the new Administration has had a chance to consider its options and decide upon a position. He pointed out that the Ethics 2000 project had recommended that the American Bar Association adopt a revised Rule 4.2 authorizing a government attorney to communicate with a represented person if authorized by court order.

He added that Congress might still enact legislation requiring the judiciary to write rules or make recommendations regarding attorney conduct. He said that it would be better for the judiciary if there were a consensus on the substance of the rules among Congress, the Department of Justice, the American Bar Association, and the states. The rules committee, he said, would be prepared to formalize any agreements through the federal rules process.

Deputy Attorney General Thompson said that while Rule 4.2 is the subject attracting the most attention and controversy, choice of law presents difficult problems and causes a great deal of uncertainty among Department lawyers. In addition, problems continue to arise from the impact of the *Gatti* decision on the conduct of Department of Justice lawyers in supervising undercover operations.

He said that the Leahy-Hatch bill pending in Congress would provide a mechanism for resolving the various issues flowing from Rule 4.2, choice of law, and undercover operations. One of the participants suggested that the Department could negotiate these matters further with the American Bar Association and the Conference of Chief Justices. Chief Justice Wells volunteered to help facilitate negotiations.

Judge Scirica noted that there was a consensus among the committee members to take no action on attorney conduct rules until the committee is required to do so.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Professor Capra presented the report of the Technology Subcommittee. He said that the subcommittee had participated with the Court Administration and Case Management Committee in preparing model local rules for the district and bankruptcy courts to implement electronic case filing (ECF). He noted that he and Nancy Miller of the Administrative Office

had drafted the rules in large measure by adapting provisions found in the local rules of the existing ECF pilot courts. He added that it was unlikely that there would be national rules governing ECF for a long time because it will take several years to deploy the ECF system in all the courts and to gather the necessary experience to identify and address problems arising in the new digital environment.

One participant suggested that drafting model local rules may be inconsistent with the committee's long-standing policy of promoting national uniformity and limiting local rules. Professor Capra and others responded that ECF is an appropriate exception to the general policy. The use of local rules, he said, is simply unavoidable in such a fast-growing area as electronic filing.

Professor Capra pointed out that some courts have taken the position that they may require the bar to file case papers electronically — a position that appears inconsistent with FED. R. CIV. P. 5. He said that the subcommittee and the Administrative Office have advised courts that the national rule contemplates that electronic filing is voluntary at this point.

Mr. Rabiej noted that the Court Administration and Case Management Committee will ask the Judicial Conference to establish a pilot program permitting selected courts to provide the public with electronic access to criminal case records. Professor Capra responded that it is important for the Technology Subcommittee to participate in the drafting of any model rules governing criminal cases. One member then suggested that the rules committees take the lead in preparing any model rules.

Professor Capra reported that he and Mr. Lafitte, chair of the Technology Subcommittee, had also provided assistance to the Court Administration and Case Management Committee in developing a report on privacy and public access to electronic case files. The report was approved by the Judicial Conference on its September 2001 consent calendar. He noted that the key finding in the report is that case documents should be made available electronically to the same extent that they are available at the courthouse — except for criminal cases, social security cases, and social security numbers and other "personal data identifiers." He pointed out that the Court Administration and Case Management Committee is now in the process of implementing the privacy statement and is pushing the Advisory Committee on Bankruptcy Rules to amend the rules to limit the use of social security numbers to the last four digits.

Professor Capra also reported that the Technology Subcommittee is working with the Advisory Committee on Civil Rules on issues relating to computer-based discovery. He also noted that he had produced a report for the Advisory Committee on Evidence Rules concluding that the evidence rules do not need to be amended at this time to take account of electronic evidence.

LOCAL RULES PROJECT

Professor Coquillette presented the report of the Local Rules Project (Agenda Item 12). He stated that Congress had been complaining about local court rules since 1983. The primary concern of Congress, he said, is that local rules, unlike the national rules, do not pass through a Congressional review process. Therefore, local rules — particularly those inconsistent with the national rules — are viewed as an "end run" around the statutory process.

He added that Congress in the 1980s had considered making the Standing Committee responsible for reviewing all local district court and circuit court rules and abrogating those inconsistent with statutes or national rules. As eventually enacted, though, the 1988 Rules Enabling Act amendments shifted review authority over local district court rules to the respective judicial councils of the circuits, while retaining review of circuit court rules in the Judicial Conference. The 1988 amendments, he said, also added a requirement that all local rules be subject to public notice and an opportunity for comment.

Professor Coquillette reported that the Judicial Conference, at the urging of Congress, had authorized the Standing Committee in the 1980s to conduct a complete review of all the local rules of the federal courts. He added that Professor Squiers had been engaged by the committee to direct the first local rules project. He explained that she first collected and analyzed all the local court rules and then presented each court with a report pointing out any local rules that appeared to conflict with the national rules, duplicate the national rules, or raise other concerns. Most of the courts responded positively to her suggestions and voluntarily deleted or modified their questionable rules. Professor Squiers' work, he said, had also identified for the advisory committees a number of innovative local rules that eventually formed the basis for later amendments to the national rules.

Professor Coquillette pointed out that even though the first local rules project had resulted in eliminating many local rules, the Civil Justice Reform Act of 1990 undid many of the gains by encouraging the adoption of new local court rules. More recently, he said, Congress, the American Bar Association, and numerous commentators have been complaining again about "balkanization" of federal practice and the proliferation of local rules. Accordingly, he noted, the Standing Committee had decided to undertake the second local rules project.

Professor Coquillette reported that Professor Squiers had been engaged again to conduct the new local rules project. He explained that she had been following essentially the same methodology used in the first study and had completed most of the work already. He praised her excellent report of December 10, 2001 (set forth as Agenda Item 12A) and pointed to its conclusion that the number of local district court rules has now increased to 5,575. He added that Professor Capra had been asked to prepare a talking paper (Agenda Item 12B) setting forth a number of options that the committee might consider in acting on the local rules project report.

Professor Capra explained that his report addressed three very broad questions:

1. Which local rules are objectionable?
2. How can the findings of the local rules project be best used in any effort to have the objectionable local rules rescinded?
3. Are there any other remedies that might reduce the proliferation of objectionable local rules?

1. Which local rules are objectionable?

Professor Capra said that four categories of local rules should be viewed as objectionable. First, he said, local rules that contradict the national rules are obviously objectionable because they are prohibited explicitly by the national rules, create difficulties for lawyers, and undermine national uniformity. Those that directly contradict the letter of the national rules are relatively easy to deal with, he said. But other local rules may only violate the spirit, rather than the letter, of the national rules or may conflict with case law construing the national rules.

Second, he noted, local rules that duplicate the national rules are also prohibited specifically by the national rules. He noted that Professor Squiers' report points to local rules that paraphrase national rules or replicate part, but not all, of a national rule.

Third, Professor Capra said that local rules that do not conform with the numbering system of the national rules are objectionable because they violate FED. R. CIV. P. 83 and its counterparts in the other federal rules.

Finally, he noted, some local rules are objectionable because they are outmoded — governing practices that have been superseded by statute or no longer exist in the federal courts.

2. How can the project's findings be used?

Professor Capra said that the goals of the local rules project are more than informational. The project, he said, should also be used as a vehicle for abrogating objectionable local rules. He suggested that it might be best to follow the same low-key informational and persuasive approach used in the first project, relying for the most part on voluntary compliance by the courts after considering the recommendations of the project, the rules committees, or the judicial councils of the circuits.

3. What other remedies might be used beyond the local rules project findings?

Professor Capra described several possible courses of actions that might be taken to reduce the proliferation of local rules.

- The judicial councils of the circuits have the statutory authority to review and abrogate local rules. But, he said, dedicated funding has not been provided for the councils to carry out their oversight responsibilities. He suggested that it might be appropriate to provide special funding to the circuits to enable them to conduct in-depth reviews of local rules and monitor compliance with the national requirements. In the absence of — or in addition to — providing funding to the circuit councils, consideration might be given to having the Standing Committee or the Administrative Office offer assistance to the councils in their efforts to oversee local rules.

- The advisory committees had considered a variety of proposals to limit local rule amendments, such as by specifying that they may take effect only once a year, by requiring that they be filed with the Administrative Office and the pertinent circuit council, or by requiring that they be approved by a central authority or the circuit council. The proposals were deferred for a variety of reasons, including uncertainty whether the Rules Enabling Act authorizes regulation of the local rules process.

- Model local rules might be prepared to address a number of typical local rule topics. But, he said, model rules in the past have had only limited success. Moreover, he suggested, a rule that is good enough to be a model on a nationwide basis is probably good enough to be a national rule.

- Both local rules projects have identified several areas in which a good deal of local rulemaking activity occurs. The advisory committees might focus on these areas and prescribe national rules that effectively preclude local rulemaking.

- He noted that one scholar has suggested an amendment to the Rules Enabling Act to limit local rules to certain specified topics.

- A former member of the Standing Committee once moved that the number of local rules in each court be limited to a specific, small number.

- Professor Capra pointed out that local rules provide a good way to experiment with new procedures that might lead eventually to national rules. But the experiments, he said, are unregulated and uncontrolled. In 1991, the Advisory Committee on Civil Rules had proposed an amendment to FED. R. CIV. P. 83 to permit district courts to experiment for up to five years with local rules that conflict with national rules. The amendment, he said, was later withdrawn because of concerns that it conflicted with the Rules Enabling Act.

- The advisory committees could review all the existing federal rules that expressly invite or require local rules and delete those not essential to deal with unique local concerns.

- Finally, he said, many local rules are not really "rules" at all, but merely sources of administrative information. This type of information, he said, might be deleted from local rules and placed in standard operating procedures or manuals available to all practitioners.

Following Professor Capra's report, Judge Scirica asked the participants to comment.

One attorney member said that the lawyers in his firm do not have major problems with local rules because they make special efforts to stay current with the rules and procedures of each court in which they practice. But a second attorney member stated that local rules are a major problem. He said that many of them serve no legitimate purpose, merely reflect the personal preferences of local judges, undermine national uniformity, and add costs for clients. He agreed that some local rules are needed to address truly unique local situations or to experiment in areas not covered by the national rules. But, he concluded, reform is badly needed, and the Standing Committee should take an activist role in seeking elimination of unnecessary local rules. A third attorney member took a "midway" position, noting that the lawyers in his firm stay current on local rules and engage local counsel when needed. He agreed that local rules often reflect little more than the style and preferences of the local judges. But, he added, some local rules are clearly beneficial because they provide guidance to attorneys in areas not addressed by the national rules.

One of the judges emphasized that local rules serve important purposes. First, he noted, they put institutional pressure on the individual judges of a court to follow uniform procedures within the court. Second, they fill many gaps in the national rules. Third, he said, they provide important guidance to lawyers on practical details. He concluded that local rules are beneficial for both bench and bar, as long as they are widely available to the bar and fairly applied.

Several other judges agreed, suggesting that complete uniformity in practice is simply not practicable. Diversity, they said, is inevitable in certain areas, such as motion practice. One added that it is the lawyers in his district, rather than the judges, who want additional local rules. One judge suggested that there are honest differences of opinion and approach among courts, and it is not always easy to determine whether local practices are inconsistent with the national rules. But two judges emphasized that national law requires national procedures, and they urged judges to work for a reduction in local procedural variations.

One participant pointed out that experience gathered under local rules can provide a sound empirical basis for promulgating new national rules. He referred to the requirement in FED. R. CIV. P. 26(f) that the parties confer early in a case, which, he noted, had come from local

court rules. He added that FED. R. CIV. P. 56, governing summary judgment, is a rich field of local rulemaking that could serve as the basis for revising the national rule.

One member suggested that the committee take a "hardball" approach towards local rules, but several other participants emphasized that it will be much more productive for the committee to seek voluntary compliance by the courts. One member added that Congress is not particularly moved by inconvenience to lawyers who practice in several jurisdictions. But, he said, it is concerned about local rules that conflict with the national rules or address important policy issues. **Therefore, he said, the committee should focus its attention on those local rules that conflict with the national rules or present serious policy implications. Judge Scirica announced that there was a consensus among the members on this point. He also said that there was general agreement that the advisory committees should consider drafting future national rules to govern those areas where local rules are seen as causing problems.**

One member pointed out that statutory authority exists to enforce national uniformity. He reported that the circuit executive's office in his circuit reviews all local rules and negotiates directly with each court to change any local rule that appears to conflict with the national rules. If a dispute is not resolved through this negotiation, he said, the circuit council will act on the matter. Another participant noted, however, that the circuits vary substantially in the attention and priority they give to local rules. Some circuits, he said, seem to take the responsibility seriously, while others give it little attention.

One participant suggested that the committee speak with the chief judges, support the circuits in their review activity, and seek additional funding or assistance for the circuits, if necessary. Another emphasized that the focus of discussions with the circuits should be on the inconsistency of some local rules with the national rules, not on the proliferation of local rules. Another participant recommended that the discussions with the circuits be used as a vehicle to obtain compliance by the remaining district courts that have not renumbered their local rules in accordance with FED. R. CIV. P. 83.

Another participant emphasized the importance of communicating with the district courts before contacting the circuits. She suggested that a report be sent to each court with appropriate recommendations and a request for cooperation. The local rules project and its objectives, she said, could also be discussed at the conference of chief district judges and other judges' meetings. Other members recommended that the chief judges of the circuits be copied on any reports sent to the district courts.

Judge Scirica reported that the June meeting of the Standing Committee will have a very full agenda, and it is not likely that the local rules project could be considered again before the committee's January 2003 meeting. But, he said, several actions could be taken before the next committee discussion. **He stated that there was a consensus among the members that the**

committee should proceed first by sending reports to the district courts, soliciting their response, and seeking voluntary compliance. The issue of appropriate circuit council involvement will be deferred by the committee to a later date. He agreed also to speak about the local rules project at the next meeting of chief circuit judges in March 2002.

OBSERVATIONS ABOUT THE RULEMAKING PROCESS

The committee spent its Friday session reflecting on the current status and the future of the rulemaking process — or, as defined by Professor Coquillette: "Where we have been and where we are going." The discussion focused on five topics:

1. the deliberative procedures of the rulemaking process;
2. restyling the rules;
3. the style and function of committee notes;
4. response to technological change; and
5. simplified rules of civil procedure.

1. *The deliberative procedures of the rulemaking process*

Professor Hazard introduced the discussion and distributed a short memorandum reflecting his views on the rulemaking process. He suggested that the rulemaking process is sound, emphasizing that it includes: careful inquiry and drafting by the advisory committees; thorough review of all proposals by the Standing Committee; substantial opportunity for public input; reconsideration by the committees following public comment; and review by the Judicial Conference, the Supreme Court, and Congress. He concluded that fundamental changes are not needed in the process. He then made six specific observations:

- Most amendments worth doing — such as those involving class actions and discovery reform — are controversial to some degree.

- Other amendments, such as clarifications and minor improvements to the rules, should be issued in batches every few years so that judges and lawyers do not have to remain on alert every year to minor changes in the rules. He added that these changes might be merged with the restyling process.

- The rulemaking process is long and complicated, but it must remain so. Great care must be taken in researching and drafting rules. And substantial time is needed to provide meaningful review and public input. But emergency amendments to the rules can be handled more expeditiously on an ad hoc basis.

- Many of the important and controversial changes in the rules arguably affect "substance" and may lie outside the scope of the rules process. Changes of this nature should be fully disclosed to Congress at an early stage in the revision process. Some of these changes might better be enacted by Congress itself.

- The rules committees must always be attentive to the superior political authority vested in Congress.

- The rules committees should maintain good and frequent communications with relevant committees of Congress.

Several participants concurred with Professor Hazard that the rulemaking process must remain lengthy and complex. They pointed out, among other things, that the process has become more political, and they noted that bar and litigant groups follow the committee process closely and are more organized and active in promoting or opposing proposed rule amendments.

One participant said that rules changes may substantially affect policy, thereby touching on the domain of Congress. It is more difficult to write rules today than in the past, he said, because the rules process is much more open and the stakes involved in some rules changes are high. The committees must consult with and involve a wide variety of competing interest groups in the process. In the final analysis, he said, Congress has authorized the judiciary to exercise the rulemaking function, but subject to its own ultimate oversight.

Another participant emphasized the need of the rules committees to show restraint in pursuing rule amendments and to be sensitive to the needs of practitioners and litigants. He emphasized the importance and advisability of facilitating substantial public input into the rules process. He noted that lobbyists now regularly attend meetings of the Advisory Committee on Civil Rules. And he observed that the Advisory Committee on Civil Rules conducts periodic, structured conferences with a broad spectrum of the bench and bar on controversial subjects — such as discovery and class actions. He emphasized that these conferences are an excellent vehicle for the bar to share its first-hand experiences and opinions with the committee. He also pointed to the advantages of the advisory committees using subcommittees to address particular subject areas in depth. And he urged the committees to continue taking advantage of the research capabilities of the Federal Judicial Center. Through these various devices, he said, the advisory committees have been able to develop a deep understanding of the topics they are addressing and an appreciation of the needs and interests of the bar.

One participant said that the rules committees should be very responsive to the needs of the bar and correct any rules that cause problems for practicing lawyers. On the other hand, he said, the committees should be very cautious in addressing any controversial matters in which Congress might have an interest.

Another participant emphasized that the "heavy lifting" in the rules process must continue to take place in the advisory committees. The essential role of the Standing Committee, she said, is to focus on the integrity of the process and to take into account the anticipated views of the Judicial Conference, the Supreme Court, and Congress. As a normal rule, she said, the Standing Committee should defer to the expertise of the advisory committees on proposed amendments.

Another participant lamented that the district courts are functioning less and less as trial courts. He pointed to wholesale delegations of responsibilities by district judges, the movement towards greater use of mediation and other ADR, and the growing popularity of arbitration clauses in contracts. He said that the rules offer a vision of trial courts that differs sharply from the emerging reality.

2. Restyling the rules

Judge Scirica reported that the restyling project had been initiated under the chairmanship of Judge Keeton. He noted that the appellate rules and criminal rules have now been completely restyled, and the products are a vast improvement over the former rules. He pointed out that a great many disparities and inconsistencies have been eliminated, and the restyled rules are much easier to read and understand. He said that the committee now has to decide whether to proceed with restyling the civil rules.

One participant emphasized that the restyling process should be divorced from any substantive changes in the rules. He said that substantive changes should proceed on a different path. Judge Garwood responded that the Advisory Committee on Appellate Rules had encountered many instances in which its efforts to revise a rule purely for style had uncovered substantive issues. And, he added, that there is a higher risk of making unintentional substantive changes in the civil rules than in the appellate rules. He observed that it would be difficult for the Advisory Committee on Civil Rules to take on the complete restyling of the civil rules at this point because its agenda is already crowded with such matters as class actions, discovery, and simplified civil procedures.

Judge Carnes added that the restyling of the criminal rules had taken a great deal of effort, including 14 meetings and active involvement of style consultants, two ad hoc subcommittees, and the advisory committee itself. He pointed out that the recent experience with the criminal rules had shown that, as a practical matter, the rules could not have been restyled in batches. Rather, he said, the Advisory Committee on Criminal Rules frequently had to examine the entire body of rules in order to refine its definitions, and in making changes in one rule it had to make conforming changes in a number of other rules.

Judge Carnes said that several factors had contributed to the success of the criminal rules restyling project. First, he said, the style consultants had produced a very good first draft of

restyled rules, from which the subcommittees and advisory committee worked. Second, the committee had engaged the expert services of Professor Stephen Saltzburg, former advisory committee reporter and member. Third, he said, the advisory committee had adopted a tough schedule for completing the project, and it adhered to the schedule faithfully. And, finally, the committee had focused its attention on restyling the rules, and it did not allow itself to get bogged down on substantive issues. Rather, it deferred all substantive issues or referred them to a subcommittee or individual member for additional research and recommendations. Thus, the committee produced two separate packages of amendments — a package of purely style changes and a separate package of amendments that included substantive changes.

Several participants suggested that the results of restyling the appellate and criminal rules are self-evident, pointing out that side-by-side versions of the old and new rules demonstrate how much easier the new rules are to read and understand. One participant responded, however, that any changes in the rules, even stylistic changes, may impose costs on practitioners and lead to new problems of interpretation.

Professor Cooper reported that the Advisory Committee on Civil Rules had begun to restyle the civil rules several years ago and had produced a partial product. He said that the civil rules restyling process had been very difficult, and the advisory committee simply could not tell what some current rules actually mean. He added that it will be difficult to present the bench and bar with a complete, restyled set of all the civil rules at one time and expect meaningful public comments, even if the comment period were extended to a full year. Lawyers, he said, will focus on those rules of particular concern to them, but few will examine all the restyled civil rules carefully. He suggested that there may be some advantages to proceeding with the civil rules in batches, making style and substantive changes at one time. In conclusion, he said, restyling the civil rules will be an enormous undertaking for the advisory committee, particularly in light of its other work, but the project will produce great benefits.

Professor Kimble emphasized that redrafting a set of rules must be undertaken at one time, although the committee might elect to publish the revised rules in batches for public comment.

Judge Scirica said that he had become a convert to the restyling process, and he emphasized the importance of learning from the recent experience and successes of Judges Garwood, Carnes, and Gene Davis. He agreed with Professor Cooper that restyling the civil rules will be a major undertaking, but will be well worth doing.

3. The style and function of committee notes

Judge Stotler began the discussion on the appropriate role and style of committee notes by pointing to the following two internal committee rules and inviting comment on them:

1. Notes accompanying rules are "Committee Notes," not "Advisory Committee Notes."

2. A note may not be changed unless a corresponding change is also made in the text of the pertinent rule.

She explained that the Standing Committee from time to time makes changes in the text of committee notes prepared by the advisory committees, just as it changes the text of proposed rule amendments. Thus, the notes effectively become the product of both the advisory committee and the Standing Committee.

Judge Stotler said that the long-standing rule against changing a committee note without making a corresponding change in the accompanying rule is designed in part to avoid blind-siding lawyers, who are alert to changes in the rules but may overlook the notes. Several participants agreed that the rule is sound. They pointed out that committee notes are a form of legislative history, reflecting the intentions of the drafters at the time a rule is amended or added. They argued that it would be inappropriate to change or supplement the notes at a later time, especially if there has been a major turnover in committee membership.

Other participants pointed out that changes in the rules themselves are subject to the full Rules Enabling Act process, including review by the Judicial Conference, the Supreme Court, and Congress. But, they said, making changes in committee notes alone could circumvent the statutory process, and the changes could affect substance through an official reinterpretation of the rules. One participant added that if the committees were to revise the notes, the public would come to expect and rely on committee notes to accurately and timely reflect case law developments.

Other participants objected to the rule and suggested that updated notes would be very helpful to the bar. One participant said that revised notes would be particularly beneficial when the text of a particular note and its rule are not completely in accord or when case law diverges from the text of the note or rule. She noted, for example, that from the outset the committee notes to the Federal Rules of Evidence had been inconsistent with the text of several of the rules enacted by Congress. But, she said, the committee's rule had prevented the advisory committee from revising the evidence notes to alert lawyers to inconsistencies and traps. Instead, she said, Professor Capra's excellent paper documenting the discrepancies between the rules and notes had been published, at the committee's urging, as a separate document by the Federal Judicial Center. But his paper is not as readily available to lawyers as committee notes. At a minimum, she said, the rule against changing notes should not be absolute, and exceptions should be allowed in appropriate cases.

Several participants suggested that committee notes should generally be short. They said that a note should simply explain the reasons for an amendment and not elaborate on case law.

One participant emphasized that notes should never add substantive material not specifically addressed in the text of a rule. He expressed concern that some notes had been used as a substitute for rulemaking, suggesting that there is a trend towards addressing controversial matters in the notes, rather than in the text of the rules.

Other participants disagreed, suggesting that longer notes elaborating on the case law are very valuable and provide the bar with practical assistance and guidance. One participant added that notes are read and followed carefully by the bar. He said that many of the comments voiced at the recent Chicago class action conference had been directed to the proposed committee notes, rather than the rules. He suggested that certain rule amendments require more elaboration than others. Thus, notes can be very short in many cases. But rule amendments that codify existing court practices may require additional explanation. The notes, he said, communicate to the bar the various factors considered by the committees and inform them how issues are resolved. He noted that the electronic era had made committee notes readily available to the bench and bar, and a greater range of background materials will be available electronically in the future, such as committee reports, minutes of meetings, agenda items, and transmittal letters. In conclusion, he said, the scope and length of committee notes are complex issues that are being addressed sensitively by the advisory committees.

4. Response to technological change

Mr. Lafitte, former chair of the Technology Subcommittee, reported that the subcommittee and the civil advisory committee had been studying a variety of issues dealing with discovery of computer-generated materials. But, he said, the committees had not reached the point where they believe that rule changes are warranted. Professor Capra added that the committees had recently conducted a conference on electronic discovery at Brooklyn Law School. The judge participants at the conference, he said, had argued against making any changes in the rules, emphasizing that the bench and bar are adapting the current rules to the new digital environment in a common-sense manner. On the other hand, he said, several lawyer participants had argued for rule amendments to give the bar additional guidance on discovery of information in electronic form.

Judge Smith noted that the Federal Judicial Center has an expert on its staff with a national reputation in the field of electronic discovery. She reported that he is besieged with requests from courts and other organizations for advice and speeches on the subject. She said that she was pleased that the rules committees have placed the subject on their agenda, since many lawyers and judges would appreciate additional guidance. One of the participants added that most corporations and professionals now keep virtually all their business records in electronic form and have revamped their internal business practices to anticipate potential discovery of their digital records.

Mr. Lafitte and Professor Capra reported that the subcommittee, in conjunction with other Judicial Conference committees, is also monitoring the electronic case files project in the courts and the privacy issues flowing from the project. Several of the participants said that electronic case files provide major benefits to the bench and bar, and they encouraged the committee to do whatever it can to facilitate the conversion to electronic case files.

5. Simplified rules of civil procedure

Judge Niemeyer and Professor Cooper reported briefly on the efforts of the Advisory Committee on Civil Rules to draft simplified rules of civil procedure. Judge Niemeyer pointed out that people have complained that they simply cannot afford to litigate in the federal courts, but they might use the system if it did not have so many rules and procedural requirements. Moreover, he said, the use of arbitration clauses is growing, and mediation and other forms of ADR are enjoying increasing popularity. He suggested that there should be a way for litigants in appropriate cases to appear relatively quickly before a federal judge, present their case, and receive a prompt decision. Therefore, the advisory committee had decided to explore the concept of developing simplified procedural rules to be used in some civil cases. He noted that the committee had presented the concept to many judges and lawyers and had received enthusiastic responses from all.

He reported that Professor Cooper had prepared an initial draft of simplified procedural rules, which had been discussed at advisory committee meetings. He said that the threshold issue in drafting the rules is to identify which types of cases should be eligible for the simplified procedures. He said that the committee had explored several eligibility options, such as fixing maximum dollar amounts or requiring consent by all the litigants. He added that the advisory committee could continue to consider various procedural incentives to make the simplified proceedings attractive to litigants.

Professor Cooper said that it was particularly important for the advisory committee to know how much enthusiasm there is in the Standing Committee for proceeding with the simplified rules proposal. He noted that the project could be a very long term undertaking, and the advisory committee needed to know what priority to assign to it.

LONG-RANGE PLANNING

Mr. Rabiej reported that the chairs of most Judicial Conference committees meet as a group twice a year to discuss long-range planning for the federal judiciary. He said that long-range planning group had asked each Conference committee: (1) to identify strategic issues within its jurisdiction; (2) consider how it can incorporate long-range planning into its regular business; and (3) identify three to five events, changes, problems, opportunities, or issues facing the judiciary over the next few years.

Mr. Rabiej noted that the rules committees have been working on several important issues that might be the basis for long-range planning sessions, including the impact of technology, developments in class actions, the high cost of litigation, the decline in the rate of trials, and the proper scope of local rulemaking. Judge Scirica said that he and the staff would prepare an appropriate written response for the long-range planning group.

FUTURE COMMITTEE MEETINGS

The next meeting of the committee is scheduled for June 10-11, 2002, in Washington, D.C.

Judge Scirica reported that the following meeting had been scheduled tentatively for January 9-10, 2003. But, he said, some participants had recommended that the meeting — and future winter meetings — be held later in January. He said that he would consult with the Judicial Conference Secretariat to find out whether a later date is feasible in light of the Conference's tight schedule for submitting committee reports. [The meeting was later set for Thursday and Friday, January 16-17, 2003.]

Respectfully submitted,

Peter G. McCabe,
Secretary

LEONIDAS RALPH MECHAM
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Associate Director

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 20, 2002

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-two bills in the first session of the 107th Congress and three bills in the second session were introduced that affect the Federal Rules of Practice and Procedure. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

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

In February 2002, the House Judiciary Committee held a hearing on H.R. 2341. The Committee eventually adopted two amendments during markup. The first amendment deleted provisions of the bill that would have imposed specific pleading requirements in all class actions. The second amendment prevents an unnamed plaintiff class member from removing the case to federal court until the class has been certified. On March 7, 2002, the Committee reported H.R. 2341 favorably by a vote of 16-10.

Three amendments were added to the bill when it was brought before the entire House during the floor debate. The first amendment prohibits a court from issuing a protective order in a class action case unless it first finds that the protective order is narrow, consistent with public health and safety, and in the public interest. The second amendment requires that plaintiffs' attorneys disclose their fees to the class members when there is a settlement, or a judgment for the plaintiffs. The third amendment directs the Judicial Conference to conduct a study on class action settlements and attorneys' fees and expenses. On March 13, 2002, the House passed H.R. 2341 by a vote of 233 to 190. The Senate has taken no further action on the bill.

Also during the first session, Senator Lieberman introduced the "E-Government Act of 2001" (S. 803) on May 1, 2001. The bill would require the federal government to develop and

maintain an integrated Internet-based system that would make it easier for the public to access government information and services. With respect to the federal judiciary, the bill requires that each court establish a web site that would include information such as the location and contact information for the courthouses, local rules, case docket information, written court opinions, and all documents filed with the court in electronic form. As noted in the administrative report, virtually all district courts have posted their local rules on their Internet web site in accordance with a Judicial Conference resolution.

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

On November 1, 2001, Senator Schumer introduced the "Federal-Local Information Sharing Partnership Act of 2001" (S. 1615). Representative Weiner introduced a similar measure – the "Federal-Local Information Sharing Partnership Act of 2001" (H.R. 3285) – on November 13, 2001. Both bills would, among other things, amend Criminal Rule 6 to permit the government to share certain grand-jury information involving foreign intelligence information with state or local law enforcement officials. Several hearings were held on S. 1615, but no action has yet been taken on the bill.

On March 7, 2002, Representative Coble introduced the "Judicial Improvements Act of 2002" (H.R. 3892). The legislation highlights and codifies in a separate, stand-alone law the existing procedures for filing a disciplinary complaint against a federal judge on grounds of (1) conduct prejudicial to the effective administration of the courts, or (2) physical or mental disability. Section 3 of the original bill would have amended 28 U.S.C. § 46(c) to exclude circuit judges who are recused from the case or controversy at hand from being counted in determining whether a majority of judges favored an en banc hearing or rehearing. Under current section 46(c), the courts of appeals have the discretion to identify which active judges may be counted for purposes of determining a "majority of active judges." Section 3 was subsequently deleted from the bill during markup sessions.

On March 1, 2001, the House passed H.R. 333, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2001." The Senate passed S. 420, the "Bankruptcy Reform Act of 2001," on March 15, 2001. Both bills substantially revise major portions of the Bankruptcy Code and would require extensive amendments to the Bankruptcy Rules and Official Forms. At the time of the last Committee meeting, both bills were being considered by a House-Senate conference committee, with little reported progress.

Recently, the conference committee reached agreement on several key issues that had stalled negotiations. The only issue blocking the committee's agreement on new bankruptcy legislation is a Senate provision that would prevent abortion opponents who were fined under the

federal Freedom of Access to Clinic Entrances, 28 U.S.C. § 248, from discharging their fines under the bankruptcy laws. The conferees are expected to meet on this issue before the Committee meeting in June.

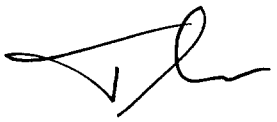
On May 9, 2001, Senator Feinstein introduced the "Social Security Number Misuse Prevention Act of 2001" (S. 848). The bill would amend Title 18, Chapter 47, to prohibit the sale, public display, or wrongful use of an individual's social security number without that individual's consent. The bill would apply to all court records that are available to the public via paper or the Internet; the bill would not apply to court records that "incidentally" include a person's social security number. (Section 4 of the bill defines "incidental" to mean that the social security number is not "routinely displayed in a consistent and predictable manner on the public record by a government entity, such as on the face of a document.")

The federal judiciary was invited to provide its view on S. 848. The Judicial Conference's Court Administration and Case Management Committee recommended that the Conference endorse S. 848, with two provisos: (1) as applied to court records, the bill would not become effective until two years after date of enactment in order to give the judiciary a chance to implement the legislation; and (2) the bill would apply only to court records created after the effective date of the bill. If the Senate Judiciary Committee rejects prospective application of the bill to court records, then the judiciary would give notice of the potential criminal penalties faced for misusing a social security number to the public when giving access to court records created prior to the effective date of the bill. By mail ballot completed on April 18, 2002, the Executive Committee on behalf of the Judicial Conference approved the Court Administration and Case Management Committee's recommendation and endorsed S. 848 with the two provisos.

On April 18, 2002, Representative Markey introduced a related measure – the "Social Security Number Protection Act of 2002" (H.R. 4513). The bill would amend Title II of the Social Security Act and would provide for civil and criminal penalties for any person engaged in the practice of selling and purchasing social security numbers. The bill directs the Federal Trade Commission to promulgate regulations that implement the legislation.

On December 19, 2001, Senator Allen introduced the "Terrorist Victims' Courtroom Access Act" (S. 1858); Representative Davis introduced a similar measure with the same title on January 23, 2002 (H.R. 3611). Under both bills, the trial proceedings of Zacarias Moussaoui in the Eastern District of Virginia would be broadcast via closed circuit video transmission to locations in Northern Virginia, Los Angeles, New York City, Boston, Newark, San Francisco, and other places for viewing by victims of the September 11, 2001, terrorist acts. S. 1858 passed the Senate on December 20, 2001, and was sent to the House where it was referred to the House Subcommittee on Courts, the Internet, and Intellectual Property. H. R. 3611 was referred to the same House subcommittee on March 18, 2002.

Representative Coble, chair of the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property, had scheduled an oversight hearing on the precedential value of unpublished appellate court opinions in May 2002. The hearing was postponed and will probably be rescheduled after the Memorial Day recess for sometime in June 2002.



John K. Rabiej

Attachments

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

SENATE BILLS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- S. 486 - *Innocence Protection Act of 2001.*
  - Introduced by: Leahy.
  - Date Introduced: 3/7/01.
  - Status: Referred to the Committee on Judiciary (6/27/01).
  - Related Bills: S. 800, H.R. 912.
  - Key Provisions:

    — The bill authorizes a person convicted of a federal crime to apply to the appropriate federal court for DNA testing to support a claim that the person did not commit: (1) the federal crime of which the person was convicted; or (2) any

other offense that a sentencing authority may have relied upon when it sentenced the person with respect to such crime.

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

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

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

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

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

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

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

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

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

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

- S. 800 - *Criminal Justice Integrity and Innocence Protection Act of 2001*
  - Introduced by: Feinstein.
  - Date Introduced: 4/30/01.
  - Status: Referred to the Committee on the Judiciary (4/30/01).
  - Related Bill: S. 486, H.R. 912.
  - Key Provisions:

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

- S. 803 - *E-Government Act of 2001*
  - Introduced by: Lieberman.
  - Date Introduced: 5/1/01.
  - Status: Referred to the Committee on Governmental Affairs (7/11/01); reported with an amendment in the nature of a substitute (3/21/02).
  - Related Bill: None.
  - Key Provisions:

    — Section 205 requires each federal court to establish a website that would include information such as the location and contact information for the courthouses, local rules, case docket information, written court opinions, and all documents filed with the court in electronic form.

    — Section 205 was later amended in a markup session to include the following. (1) subsection (c)(2)(C) was amended to allow the Judicial Conference to promulgate rules to protect "important privacy and security" concerns in the course of making electronically-filed court documents available to the public, and (2) subsections (a) and (g) was amended to authorize the chief judge of each bankruptcy court to establish a web site for each bankruptcy court.

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

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

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

- S. 986 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley.
  - Date Introduced: 6/5/01.
  - Status: Referred to the Committee on Judiciary (6/5/01); reported without amendment and placed on Senate Legislative Calendar under General Orders (11/29/01).
  - Related Bill: H.R. 2519.
  - Key Provisions:
    — The bill authorizes a presiding district or circuit court judge to permit media coverage of court proceedings over which that judge presides.
    — The bill also authorizes the Judicial Conference to promulgate advisory guidelines in order to implement a media coverage policy.

- S. 1315 - *Judicial Improvement and Integrity Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 8/2/01.
  - Status: Referred to the Committee on Judiciary (8/2/01).
  - Related Bill: None.
  - Key Provisions:
    — The bill (1) amends 18 U.S.C. § 1512 to increase the criminal penalty for those who use physical force or threaten the use of physical force against witnesses, victims, or informants; (2) amends Title 18, U.S.C., to authorize the imposition of both a fine and a term of imprisonment; (3) amends Chapter 213 of title 18, U.S.C., to permit the reinstatement of criminal counts dismissed pursuant to a plea agreement; and (4) clarifies certain sentencing provisions.

- S. 1437 - *Professional Standards for Government Attorneys Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 9/19/01.
  - Status: Referred to the Committee on Judiciary (9/19/01).
  - Related Bill: None.
  - Key Provisions:
    — The bill amends **28 U.S.C. § 530B** to: (1) clarify the applicable standards of professional conduct that apply to a "government attorney"; (2) provide that a "government attorney" may participate in covert activities, even though such activities may involve the use of deceit or misrepresentation; and (3) direct the Judicial Conference to prepare two reports regarding the regulation of government attorney conduct.
    — The Act also directs the Judicial Conference to come up with recommendations for amending the **federal rules** to (a) provide for a uniform national rule for "government attorneys" with respect to communicating with represented persons and parties, and (b) address any areas of actual or potential conflict between the regulation of "government attorneys" by existing standards of professional responsibility and the duties of "government attorneys" as they relate

to the investigation and prosecution of federal law violations.

- S. 1615 - *Federal-Local Information Sharing Partnership Act of 2001*
  - Introduced by: Schumer
  - Date Introduced: 11/1/01.
  - Status: Referred to the Committee on Judiciary (11/1/01). Hearing held (12/11/01).
  - Related Bill: H.R. 3285, H.R. 4598.
  - Key Provisions:

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

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

    — Section 3 amends **28 U.S.C.** by including an additional chapter on class actions. The Act includes provisions on settlement, notices of settlement information to class members, jurisdiction of federal courts, and removal of class action proceedings to federal court.

    — The Act also directs the Judicial Conference to prepare and submit a report to the House and Senate Committees on the Judiciary within 12 months from the date of the enactment of the Act. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair, (2) recommendations to ensure that class members are the primary beneficiaries of settlements, and (3) the actions that the Judicial Conference will take to implement its recommendations.

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

    — Under section 9, within 90 days after the occurrence of an act of terrorism the Judicial Panel on Multidistrict Litigation shall assign a single federal district court to conduct pretrial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from that act of terrorism. The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all such actions.

Punitive or exemplary damages are not allowed under the Act.

- S. 1858 - *Terrorist Victims' Courtroom Access Act*
  - Introduced by: Allen.
  - Date Introduced: 12/19/01.
  - Status: Referred to the Senate Committee on the Judiciary (12/19/01). Passed Senate with an amendment by unanimous consent (12/20/01). Received in House (1/23/02) and referred to House Committee on the Judiciary (1/23/02). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/18/02).
  - Related Bills: H.R. 3611.
  - Key Provisions:

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

HOUSE BILLS

- H.R. 333 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2001*
  - Introduced by: Gekas.
  - Date Introduced: 1/31/01.
  - Status: House-Senate conference with S. 420 and S 220 (7/31/01).
  - Related Bills: H.R. 71, S. 220, S. 420.
  - Key Provisions:

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

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

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

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

    — Section 435 directs the Advisory Committee to propose amendments to the

Bankruptcy Rules and the **Bankruptcy Forms** to assist small business debtors in complying with new uniform national reporting requirements.

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

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

— Section 716 expresses the sense of Congress that the Advisory Committee propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** regarding objections to a plan confirmation by a government unit and to tax returns.

— Section 1233 amends **chapter 158 of title 28, U.S.C.**, to give the courts of appeal jurisdiction to authorize immediate interlocutory appeals from the district court and bankruptcy appellate panel.

- H.R. 860 - *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001*
  - Introduced by: Sensenbrenner
  - Date Introduced: 3/6/01.
  - Status: House suspended rules and passed bill as amended (3/14/01). Received in the Senate and referred to the Committee on the Judiciary (3/15/01).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **section 1407 of title 28, U.S.C.,** to allow a judge with a transferred case to retain that case for trial or to transfer the case to another district.

    — Section 3 amends **section 85 of title 28, U.S.C.,** to give the district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person, exclusive of interest and costs.

- H.R. 912 - *Innocence Protection Act of 2001*
  - Introduced by: Delahunt
  - Date Introduced: 3/7/01.
  - Status: Referred to the House Committee on the Judiciary (3/7/2001). Referred to the Subcommittee on Crime (4/19/01).
  - Related Bills: S. 486, S. 800.
  - Key Provisions.

— The Act was a companion measure with S. 486. Generally, the Act sets forth procedures for postconviction DNA testing.

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

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

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

- H.R. 2341 - *Class Action Fairness Act of 2001*
  - Introduced by: Goodlatte
  - Date Introduced: 6/27/01.
  - Status: Referred to the House Committee on the Judiciary (6/27/01). Rules Committee Resolution H. Res. 367; Rule provides for consideration of H.R. 2341 with 1 hour of general debate (3/12/02). Passed House with three amendments (Nadler H. Amdt 435; Keller H. Amdt 437; and Hart H. Amdt 442) by the Yeas and Nays: 233 - 190 (3/13/02).
  - Related Bills: S. 1712; H. Res. 367.

- Key Provisions:

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

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

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

  — Section 6 amends **section 1292(a) of title 28, U.S.C.,** to allow for the interlocutory appeal of class certification orders made pursuant to Civil Rule 23. Unless otherwise ordered, all discovery and other proceedings shall be stayed during the pendency of any such appeal.

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

- H.R. 2519 - *To allow media coverage of court proceedings*
  - Introduced by: Chabot
  - Date Introduced: 7/17/01.
  - Status: Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (8/6/01).
  - Related Bills: S. 986.
  - Key Provisions:

    — Section 2 authorizes the presiding judge of a federal appellate or district court to allow media coverage of any proceeding in which the judges presides. Section 2 also authorizes the Judicial Conference to promulgate advisory guidelines on the allowance of media coverage in court proceedings.

- H.R. 2734 - *Bail Bond Fairness Act of 2001*
  - Introduced by: Barr

• Date Introduced: 8/2/01.
• Status: Referred to the House Committee on the Judiciary (8/2/01); Referred to House Subcommittee on Crime (9/10/01).
• Related Bills: H.R. 2929.
• Key Provisions:

— The Act amends **18 U.S.C. §§ 3146 and 3148** to provide that the forfeiture of a bail bond is limited to those situations in which the defendant actually fails to physically appear before a court as ordered. (The Act specifically provides that a judicial officer may not order a bond forfeited simply because the defendant violated a condition of release, notwithstanding the provisions in Criminal Rule 46(e).)

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

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

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

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

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

- H.R. 3162 - *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*
  • Introduced by: Sensenbrenner.
  • Date Introduced: 10/23/01.
  • Status: Referred to the Committee on the Judiciary, and in addition to the Committees

on Intelligence (Permanent Select), Financial Services, International Relations, Energy and Commerce, Education and the Workforce, Transportation and Infrastructure, and Armed Services (10/23/01). On motion to suspend the rules and pass the bill agreed to by the Yeas and Nays: 357 - 66 (10/24/01). Received in the Senate (10/24/01). Passed Senate without amendment by yea-nay vote of 98 - 1 (10/25/01). Signed by the President; became Public Law No: 107-56 (10/26/01).

- Related Bills: S. 1510; H. Res 264; H.R. 2975, H.R. 3108.
- Key Provisions:

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

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

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

- H R. 3210 - *Terrorism Risk Protection Act*
  - Introduced by: Oxley.
  - Date Introduced: 11/1/01.
  - Status: Referred to the House Committees on Financial Services, Ways and Means, and the Budget (11/1/01). Passed the House by a yea-nay vote of 227 to 193 (11/29/01). Received in the Senate (11/30/01). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (11/30/01). Read the second time and placed on Senate Legislative Calendar under General Orders (12/3/01).
  - Related Bills: S. 1751.
  - Key Provisions:

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

- H.R. 3285 - *Federal-Local Information Sharing Partnership Act of 2001*
  - Introduced by: Weiner.
  - Date Introduced: 11/13/01.
  - Status: Referred to the House Committee on the Judiciary, and in addition to the Committees on Intelligence (Permanent Select), Financial Services, and Education and

Workforce (11/13/01). Referred to the Subcommittee on 21st Century Competitiveness (3/6/02).

- Related Bills: S. 1615.
- Key Provisions:

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

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

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

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

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

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

- H.R. 3892 - *Judicial Improvements Act of 2002*
  - Introduced by: Coble.
  - Date Introduced: 3/7/02.
  - Status: Referred to the House Committee on the Judiciary (3/7/02). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (3/15/02). Subcommittee consideration and mark-up session (3/20/02). Judiciary Committee consideration and

mark-up session. Ordered to be reported as amended (4/24/02). Reported by the Committee and placed on Union Calendar (5/14/02)

- Related Bills: None.
- Key Provisions:

— **28 U.S.C. § 46(c)** provides that a majority of judges who are in regular active service may order an en banc hearing or rehearing before the court. Section 3 amends the statute by providing that for purposes of determining a majority of judges, "there shall be excluded any judge who is recused from the case or controversy at issue."

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

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

SENATE RESOLUTIONS

HOUSE RESOLUTIONS

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

May 14, 2002

MEMORANDUM TO THE STANDING COMMITTEE

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

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

Automation Project (Documentum)

We have successfully transferred our entire database from our former document-management system to our new document-management system (Documentum 4i). We are now working with the contractor to customize Documentum 4i to suit our particular needs and the needs of other offices in the Office of Judges Programs. The testing phase is nearly completed. We expect to be using the new system for all our rules documents by the time the committee meets in June.

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

Internet

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

In late 2001, the Administrative Office's Office of Internal Services hired a contractor to conduct an assessment of the Administrative Office's web sites: J-Net, AOWEB, and USCourts. Specifically, the contractor was directed to assess whether the AO sites were easy to understand, use, and find information. In March 2002, the contractor presented its findings to the AO. With respect to our Federal Rulemaking web site, the contractor recommended only two minor changes that we have considered and acted upon.

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

Committee and Subcommittee Meetings

For the period from January 10, 2002, to May 13, 2002, the office staffed 12 meetings, including one Standing Committee meeting, six advisory committee meetings, four subcommittee meetings, and a meeting of an informal group of judges working on mass torts issues. The office has also arranged and participated in numerous conference calls involving committee chairs or subcommittees.

The docket sheets of all suggested amendments for Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source and status and disposition is listed The docket sheets are updated after each committee meeting, and they are included in each agenda book. We have also finished a preliminary docket sheet for Bankruptcy Rules and hope to have that completed within the near future.

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

Record Keeping

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

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

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

Manual Tracking

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

State Bar Points-of-Contact

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

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

Mailing List

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

Miscellaneous

In January 2002, we prepared and published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure* seeking public comment on proposed amendments to Bankruptcy Rule 1005 and eleven official bankruptcy forms. We sent the pamphlet to legal publishers and the court family and we posted it on the federal rulemaking web site.

Since the last committee meeting, eleven more district courts have posted their local rules on their respective web sites. We have updated our federal rulemaking web site to include these recently-posted local rules. We now have posted on our web site the local rules for every district court in the country, except for one district court whose local rules page is still "under construction."

In March 2002, we delivered to the Supreme Court the proposed amendments to Rules 6 and 41 of the Federal Rules of Criminal Procedure that were approved by the Judicial Conference following its March 2002 session. The amendments conform to the recently-enacted Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 (Pub. L No. 107-56).

The Supreme Court approved the Judicial Conference's proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, with one exception, and transmitted these rules to Congress on April 29, 2002. The Court did not approve the amendment to Criminal Rule 26(b). In a separate statement, Justice Scalia expressed concern that the amendment raises serious questions regarding the Sixth Amendment's Confrontation Clause.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

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

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

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

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

Proposal	Source, Date, and Doc #	Status
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approved 9/98 — Jud. Conf approved and transmitted to Sup. Ct. 4/99 — Supreme Court approved 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Supreme Court approved 12/01 — Effective **COMPLETED**
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approved amendments 6/01 — Stg Cmte approved 10/01 — Jud Conf approved 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Removed under consent calendar **COMPLETED**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — Rejected by cmte **COMPLETED**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, & Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) 5/02 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. 4/00 — Supreme Ct transmits to Congress 12/00 — Effective **COMPLETED**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00— Supreme Court approved 12/00 — Effective **COMPLETED**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV15(c)(3)(B)] — Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV15(c)(3)(B) — Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 — Referred to chair and reporter 1/02 — Committee considered 5/02 — Committee considered **PENDING FURTHER ACTION**

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

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcomte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved **PENDING FURTHER ACTION**
[CV23(e)] — Preserve right to appeal for *unnamed* class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B) 6/21/00	4/00 — Referred to reporter, chair, Agenda Subcmte,, and Class Action Subcmte 6/00 — Referred to reporter, chair, Agenda Subcmte, and Class Action Subcmte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**

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

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

Proposal	Source, Date, and Doc #	Status
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — Rejected by cmte **COMPLETED**
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte **COMPLETED**

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

Proposal	Source, Date, and Doc #	Status
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV40] — precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43] — procedures for a "summary bench trial"	Judge Morton Denlow 8/9/00 (00-CV-F)	8/00 — Referred to reporter, chair, and incoming chair 10/00 — Comte considered, declined to take action as unnecessary at this time **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**

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

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

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

Proposal	Source, Date, and Doc #	Status
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision 1/02 — Committee considered and set for further discussion **PENDING FURTHER ACTION**
[CV58] — 60-day cap on finality judgment	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves 8/00 — Published 4/01 — Cmte approved revised amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV62.1] — Proposed new rule governing "Indicative Rulings"	Advisory Comm on Appellate Rules 4/01	1/02 — Committee considered **PENDING FURTHER ACTION**
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903 Gregory K. Arenson 4/19/02 (02-CV-D)	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED** 5/02 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV77(d)] — Electronic noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 6/99 — Stg Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus Rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 4/00 — Comte considered 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approves amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Sup Ct approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved amendments 6/00 — Approved by ST Cmte 9/00 — Approved by Jud Conf 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment 6/00 — Stg Comte approved 8/00 — Published for comment 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considers **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy **COMPLETED**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) 4/99 — Cmte deferred for further study **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. 8/99 — Subc recommended removal from agenda 10/99 – Cmte approved recommendation **COMPLETED**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[To prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes]	Tom Scherer 3/2/00 (00-CV-D)	7/00 — Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
[Notice to U.S. Attorney. Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action]	Judge Barbara B. Crabb 10/5/00 (00-CV-G)	10/00 — Referred to reporter and chair 1/02 — Committee considered **PENDING FURTHER ACTION**
[Specifying page limit for motions in Civil Rules]	Jacques Pierre Ward 1/8/01 (01-CV-A)	4/00 — Referred to reporter and chair 1/02 — Committee recommended no change **COMPLETED**
[To develop new Federal procedures for decisions on minority litigant discrimination cases]	Tracey J. Ellis 1/26/02, 4/10/02 (02-CV-A)	1/02 — Referred to reporter and chair 4/02— Referred to reporter and chair 5/02 — Cmte considered and rejected **COMPLETED**
[Court filing fee: AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court]	James A. Andrews 4/1/02 (02-CV-C)	4/02 — Referred to reporter and chair **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 4] — Clarify the ability of judges to issue warrants via facsimile transmission	Magistrate Judge Bernard Zimmerman 1/29/01 (01-CR-A)	1/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98; Judge Durwood Edwards 6/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Forwarded to ST Cmte; version requires defendant's consent and court approval 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 5.1(d)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — ST Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR 6] — Allow grand jury witness to be accompanied by counsel (see CR 6(d) below)	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 6] — Allow sharing of grand jury information pertaining to foreign intelligence	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte approved conforming amendments 1/02 — Standing Cmte approved 3/02 — Jud Conf approved 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — ST Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed 10/99 — Approved for publication by advisory cmte **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6(f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR7(b)] — Effect of tardy indictment	Congressional constituent 3/21/00 (00-CR-B)	5/00— Referred to chair and reporter **PENDING FURTHER ACTION**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by ST Cmte 10/98 — revised and resubmitted to ST Cmte for transmission to conference — 1/99— Approved by ST Cmte 3/99— Approved by Jud Conf 4/00— Approved by Supreme Court 12/00 — Effective **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01— Approved and forwarded to ST Cmte 6/01— Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11] — Advise non-U.S. citizen defendant of potential collateral consequences when accepting guilty plea	Richard J. Douglas, Atty., Senate Committee on Foreign Relations 4/3/01 (01-CR-C)	4/01 — Referred to reporter & chair **PENDING FURTHER ACTION**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(b)(2)] — Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter 4/00 — Considered; request to publish 6/00 — ST Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **COMPLETED**
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12.2(c)] — Authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered 10/99 — Considered by cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 12.2(d)] — Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 12.4] — Financial disclosure	Stg Comte, 1/00	4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 1/00 — Considered by cmte as part of style package 4/00— Comte decided not to take action **COMPLETED**
[CR 16(a) — Permit the same discovery of experts as is permitted under the civil rules	Carl E. Person, Esq. 6/01 (01-CR-D)	6/01— Referred to reporter and chair 4/02 — Considered and rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 23(a)] — Address the issue of when a jury trial is authorized	Jeremy A. Bell 11/00 (00-CR-D)	11/00 — Sent to chair and reporter **PENDING FURTHER ACTION**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included in style package 10/99 — Rejected inclusion in style package **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Proposed amendment rejected by Sup Ct **COMPLETED**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29] — Extension of time for filing	Judge Paul L. Friedman 3/02 (02/CR/B)	4/02 — Sent directly to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking process should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—findings on controverted matters in presentence report		3/00 — considered by subcomte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte withdrew recommendation **COMPLETED**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**
[CR 32(c)(5)] — clerk required to file notice of appeal	Clerk, 7th Circuit 4/11/00 (00-CR-A)	3/00 — Sent directly to chair 5/00 — referred to reporter **PENDING FURTHER ACTION**
[CR 32(d)(1)] — finality of sentence imposing order of restitution	Judge D. Brock Hornby 3/11/02	3/02 — Sent to chair and reporter 4/02 — Adv Cmte considered and declined to take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed 1/00 — considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved by Advisory Cmte as part of style package and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.1]— Right of allocution before sentencing at revocation hearing	U.S. v. Frazier 2/25/02	3/02—Referred to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**
[CR 33] — Extension of time for filing motion for new trial	Judge Paul L. Friedman 3/02 (02-CR-B)	4/02 — Sent directly to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 34] — Extension of time for filing	Judge Paul L. Friedman 3/02 (02-CR-B)	4/02 — Sent directly to chair and reporter 4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[CR 35] — Allow defendants to move for reduction of sentence	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A); Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter 1/00 — Considered by comte as part of style package 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered 4/00— Considered and included in request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00— Approved by Supreme Ct 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41] — Allow magistrate judge to issue nationwide search warrant	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte approved conforming amendments 1/02 — Standing Cmte approved 3/02 — Jud Conf approved 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	6/00 — Stg Comte approves request to publish 8/00 — Published (rejects expansion of time period) 4/01— Approved and forwarded to ST Cmte 6/01— Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 41(c)(1) — to just provide that the warrant designate the court to which shall be returned	Judge D. Brock Hornby 11/28/01 (02-CR-A)	2/02— Referred to reporter, chair, and Rule 41 Subcommittee 4/02 — Adv Cmte considered and declined to take action **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte decided to defer further action 4/02 — Advisory Cmte considered and elected not to amend rules to provide for covert searches. **COMPLETED**
[CR42(b)] — magistrate judge contempt power clarification	Magistrate Judge Tommy Miller 12/00 (00-CR-E)	4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered 1/00 — Considered by comte as part of style package 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(a) — Defendant may waive arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46(d)] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58] — magistrate judge petty offenses jurisdiction	Magistrate Judge Tommy E. Miller 12/00 (00-CR-E)	12/00 — Sent to chair & reporter 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Appeal from a magistrate judge's nondispositive, pretrial order]	U.S. v. Abonce-Barerra 7/20/01	4/02 — Adv Cmte considered **PENDING FURTHER ACTION**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action 4/02 — Advisory Cmte approved amendments **PENDING FURTHER ACTION**
[Hab Corp R8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action 4/02 — Advisory Cmte approved amendments **PENDING FURTHER ACTION**
[Modify the model form for motions under 28 U.S.C. § 2255]	Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00 (00-CR-C)	8/00 — Referred to reporter & chair 4/02 — Cmte approved forms **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 4/00— Rules 32-60 approved by comte; request to publish Rules 1-60 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with amendments and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Approved by Sup Ct **PENDING FURTHER ACTION**
[Restyling Hab. Corp. Rules]		10/00 — Considered 1/01 — ST Cmte authorizes restyling to proceed 4/02 — Advisory Cmte approved for request to publish **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory cmte for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court 12/00 — Effective **COMPLETED**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study 10/99 — Subcomte established to study 4/00 — Cmte considered subc's drafts 4/01 — Cmte considered subc's drafts 4/02 — Cmte considered subc's drafts **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared **COMPLETED**
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608(b)] — Inconsistent rulings on exclusion of extrinsic evidence		10/99 — Considered 4/00 — Cmte directed reporter to prepare draft amendment 4/01 — Cmte recommended publication 6/01 — Approved for publication by ST Cmte 8/01 — Published for public comment 4/02 — Cmte approved amendments with modifications **PENDING FURTHER ACTION**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration 10/98 — Cmte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved 12/98 — Effective **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 703] — Bases of Opinion Testimony by Experts (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Cmtes 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **PENDING FURTHER ACTION**
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Cmte 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**
[EV 803(18)] — Should "learned treatises" be received as exhibits	Judge Grady	4/00— Considered; comte decides not to act **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(3)] — Degree of corroboration regarding declaration against penal interest		10/99 — Considered by cmte 4/00 — Cmte directed reporter to prepare draft amendment 4/01 — Cmte recommended publication 6/01 — Approved for publication by ST Cmte 8/01 — Published for public comment 4/02 — Cmte considered in light of public comments and rejected. Cmte approved revised rule and recommended publication **PENDING FURTHER ACTION**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 —Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Comte approved **COMPLETED**
[EV 902] — Use of seals	DOJ Committee member	10/99 — Cmte considered 4/00 — Cmte considered and rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered 4/00 — Considered **PENDING FURTHER ACTION**
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Cmte Approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report; cmte declined to act **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

Committee on Rules of Practice and Procedure
June 2002
Agenda Item Tab 4
Information Item

Federal Judicial Center Update

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

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

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

I. Educational Programs for Judges and Court Staff

In addition to the FJTN programming and publications described elsewhere in this material, the Center provides a variety of opportunities for new and experienced judges to attend educational programs. For the remainder of 2002, these include:

- orientation programs (as necessary) and national workshops for district, bankruptcy, and magistrate judges, respectively.
- a strategic planning workshop in June for court teams of judges and court managers from several district courts.
- two executive institutes for chief judges and their unit executives — bankruptcy court teams will attend an October 28-30 program; district court teams will attend a November 13-15 program; participants will examine historical case studies based on Lincoln's leadership during the Civil War and draw parallels to contemporary court management challenges.

- beginning in October 2002 and extending through 2003, a series of circuit-based workshops.
- a national symposium for court of appeals judges in Washington, D.C. in October 2002;
- programs on special topics, such as intellectual property, environmental law, mediation skills, and law and the Internet and in-court seminars on topics such as intellectual property, opinion writing, and genetics.

The Center also produces original videos to complement Center curricula or to use as stand-alone programming. Videos in progress include an updated ethics program for use in orientation seminars for judges and an instructional program on the patent process for judges to show to jurors in patent cases.

The Center will provide a limited number of travel-based programs and a variety of distance education opportunities for court personnel in the coming months. Specifically:

- a national conference for district court clerks, executives, and chief deputies.
- a national conference for chief probation and pretrial services officers;
- three Case Management/Electronic Case Files (CM/ECF) products: a guide to help supervisors manage the people side of the transition to CM/ECF, a web-based tutorial to help law office staff file criminal cases electronically, and a packaged program for deputy clerks on CM/ECF customer service;
- for probation and pretrial services officers: three national orientation seminars and a train-the-trainer workshop to teach presentation skills to experienced officers who will facilitate sessions at the officer orientation seminars;
- a mid-stage workshop for the 2001-2003 class of the Leadership Development Program for Probation and Pretrial Services Officers and the concluding workshop for the 2000-2002 class of the Federal Court Leadership Program;
- two regional workshops for experienced court training specialists;
- a recently-released packaged training program, *Communicating for Peak Performance: A Workshop for Federal Court Managers*, that will be delivered at the local court level by a cadre of court employees who attended a February 2002 train-the-trainer workshop;
- a web-based instructional program to help federal court employees understand how the courts work, how they are organized, and how they fit into the U.S. system of government (the program may also help students, the media, and the public learn more about the federal courts);
- continuation of two on-line conferences that began in May 2002: preliminary instruction for class IV participants in the two and one-half year Federal Court Leadership Program, and effective time management for bankruptcy courtroom deputies.

Judicial Manuals and Monographs. The Center has published a monograph, *Redistricting Litigation*, which covers legal, statistical, and case management issues that arise in these cases. Copies can be obtained from the Center's Information Services Office. We published a monograph on international insolvency, which was authored by Judges Samuel L. Bufford (Bank., C.D. California); Louise DeCarl Adler (Bank., S. D. California); Sidney B. Brooks and Marcia S. Krieger, (D. Colorado). The monograph was distributed to all bankruptcy judges, and is available upon request from the Center's Information Services Office. We are finalizing a project on managing state capital habeas cases as a companion resource to our recently completed compilation and summary of procedures used in handling federal death penalty cases. The latter includes a description of how these procedures differ from those used in more routine criminal litigation and sample jury questionnaires, instructions, verdict forms, scheduling orders, and other materials developed by judges who have handled death penalty cases. The capital habeas materials will be available in electronic form on the Center's website, as are the federal death penalty materials. Both will be revised as the courts' experiences warrant. Work continues on the fourth edition of the *Manual for Complex Litigation* and a bankruptcy debtor education handbook. The Center is preparing a new edition of the Deskbook for Chief Judges, with a projected publication date of mid-2002. With the services of Professor Elizabeth Gibson, we are developing a manual on mass tort bankruptcy cases. The target publication date is early 2003.

II. The Federal Judicial Television Network

The Administrative Office has installed downlink antennae in some 300 court locations. Center staff manage the FJTN studios and produce the *FJTN Bulletin*, with broadcast calendars and a synopsis of upcoming programs from the Center, the United States Sentencing Commission, and the Administrative Office. The Center posts an electronic copy of the bulletin on its intra-net web site. The Center's program schedule for 2002 features a variety of original programs for judges and court staff.

Programs for Judges and Law Clerks. Recent Center programs for judges included a program on terrorism and the law, which examined changes made by the USA PATRIOT Act, including changes in immigration law, electronic surveillance, and bank account information. Other broadcasts included a bankruptcy law update and a review of

bankruptcy decisions in the Fourth Circuit. The latter was an interactive program in which bankruptcy judges from throughout the Circuit participated. If major bankruptcy legislation is enacted, the Center will broadcast a program on the new law.

Programs for Court Staff. The June–December 2002 FJTN schedule offers fourteen original Center broadcasts for court personnel. Broadcasts that may be of interest to the Committee include programs on the court unit executive's role in public information and outreach (with the Administrative Office), ethics and professionalism in the workplace, leadership competencies, and how to conduct productive meetings. Programs for probation and pretrial services officers will provide suggestions for working with mentally disordered offenders, scenarios for safety in office settings, and information on the 2002 amendments to the Sentencing Guidelines (a new edition of our collaborative series with the U.S. Sentencing Commission).

Programs Broadcast for the Administrative Office. The Center's FJTN staff work with AO staff to broadcast AO programs on human resources and other matters, such as employee benefits, employee dispute resolution, automation training, and case management/electronic case filing.

Videoconferencing Studio. The Center also manages the Thurgood Marshall Building videoconferencing studio, a facility used for training programs and meetings. During October 2002, new court training specialists will participate in a five-part orientation using this medium in lieu of a travel-based workshop.

III. Research Projects

Judicial History. The Center's history office has initiated an educational project on illustrative cases in the history of the trial and intermediate appellate courts of the federal judiciary. The first unit, focused on the *Amistad* case, is available on line on the Center's home pages and was released in conjunction with broadcast of the Center's educational video on the case. The next unit will concern several cases dealing with issues of loyalty and free speech. The history office has also completed a history of the office of district court clerk and is revising the history section of the Center's home page to include more information on the history of judicial administration and courts of special jurisdiction.

Class Action Filing Patterns. At the request of the Advisory Committee on Civil Rules, we are examining filing patterns in federal class action cases. The results of our analysis of the docket-level data in a large sample of class actions will be presented at the October 2002 meeting of the Civil Rules Committee.

En banc Practices. We have completed a study of the appellate courts' differing positions on Fed. R. App. P. 35(a)'s absolute majority rule covering decisions by *en banc* panels. Our report has been submitted to the Advisory Committee on Appellate Rules. A copy of the report can be obtained from the FJC's website or though our Information Services Office.

Discovery of Computer-based Information. The preliminary report of the findings of our qualitative study of issues raised by the discovery of computer-based information in civil litigation is being presented at the Spring 2002 meeting of the Advisory Committee on Civil Rules. While our study focused on civil cases, our findings are expected to have some relevance to the discovery of computer-based information in criminal cases.

Courtroom Technology and Electronic Evidence. As part of the courtroom technology project referenced in our last report to this Committee, the Center collaborated in April with the Courtroom 21 Project of the University of William and Mary Law School in conducting a lab trial to examine a number of courtroom technology issues. The trials included use of immersive virtual environment technology (IVET). We are also conducting an on-line survey of district court clerks to determine what courtroom technology is used in their district courts and for what purpose it is used, and how the technology is managed at the local level and the resources required to do so. We have collaborated with the Administrative Office on the content of the survey, and several offices have added questions that would be useful to them in managing the Courtroom Technology Program.

Use of Summary Judgment and Other Dispositive Motions. The Center has periodically collected information about summary judgment practices. We have compiled

initial findings regarding the rate of summary judgments, and are currently conducting a detailed docket analysis of a large sample of cases terminated by other types of dispositive motions. The study will identify changes in the nature and extent of such motions, the degree to which motions practice has changed, and the types of cases resolved.

On-Site Educational Assistance in ADR and Settlement. At the suggestion of participants in a workshop conducted after the 1998 ADR Act was passed, the Center has begun a project that will provide on-site educational assistance to courts that want help in developing or refining their ADR or settlement procedures. Some judges and court staff have developed considerable expertise in ADR and settlement. For courts that wish to call upon that expertise, the Center will support on-site consultation. An advisory group has been appointed to assist with this project.

Assessments of Judicial Workloads. We continue to advise the Statistics Subcommittee of the Judicial Resources Committee on aspects any further research that may be necessary to determine the feasibility of the development of event-based district court case weights. At its January 2002 meeting, the Committee on the Administration of the Bankruptcy System asked the Center to develop a design for a study to calculate new bankruptcy case weights. The Center's proposed design for developing the next generation of bankruptcy case weights will be presented at the June meeting of the Committee.

Courtroom Technology and Electronic Evidence. As part of the courtroom technology project referenced in our last report to this Committee, the Center collaborated in April with the Courtroom 21 Project of the University of William and Mary Law School in conducting a lab trial to examine a number of courtroom technology issues. The trials included use of immersive virtual environment technology (IVET). We are also conducting an on-line survey of district court clerks to determine what courtroom technology is used in their district courts and for what purpose it is used, and how the technology is managed at the local level and the resources required to do so. We have collaborated with the Administrative Office on the content of the survey, and several offices have added questions.

Assessment of the Needs of Native American Offenders under Federal Supervision for Substance Abuse and Mental Health Services. Following a recent request from the Administrative Office's Office of Probation and Pretrial Services, the Center is conducting a formal assessment of the substance abuse and mental health needs of Native American offenders under federal supervision. The study focuses on the needs of offenders in the fourteen districts with the highest number of Native Americans under federal supervision.

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
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MILTON I. SHADUR
EVIDENCE RULES

MEMORANDUM

DATE: May 21, 2002

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22, 2002, in Washington, D.C. At its meeting, the Advisory Committee approved two sets of proposed amendments, one of which is now being presented to the Standing Committee, the other of which will be held and presented later as part of a group of proposed amendments. The Advisory Committee also agreed to continue to study a couple of controversial proposals, which I discuss below. Finally, the Advisory Committee removed several items from its study agenda.

Detailed information about the Advisory Committee's activities can be found in the minutes of the April 22 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

A. Forms 1, 2, 3, and 5

Four of the five forms in the appendix to the Appellate Rules refer to "the ___ day of _____, 19__" (Forms 1 and 2), "entered on _____, 19___" (Form 3), or "entered in this case on _____, 19___" (Form 5). At its April meeting, the Advisory Committee voted to replace all references to "19__" in Forms 1, 2, 3, and 5 with references to "20__." This appears to be the type of technical change that does not need to be published for comment.

III. Information Items

A. Amendments Approved for Later Submission to the Standing Committee

The Advisory Committee is continuing to consider and approve proposed amendments to the Appellate Rules, although, pursuant to the wishes of the Standing Committee, the Advisory Committee will not forward these amendments in piecemeal fashion, but will instead present a package of amendments at a later date. At its April meeting, the Advisory Committee approved the following amendments:

- An amendment to Rule 26(a)(4), which would replace the reference to "Presidents' Day" with a reference to "Washington's Birthday."

- An amendment to Rule 45(a)(2), which would replace the reference to "Presidents' Day" with a reference to "Washington's Birthday."

B. Long-Term Projects

At its April meeting, the Advisory Committee decided to continue to study several proposed amendments, including two that I wish to bring to your attention, as they will undoubtedly be the subject of much controversy if the Advisory Committee should approve them for submission to the Standing Committee.

The first proposal pertains to 28 U.S.C. § 46(c) and Rule 35(a), both of which require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc. A three-way circuit split has developed over the question whether judges who are disqualified are counted in calculating what constitutes a "majority":

- Eight circuits use the "absolute majority" approach. In these circuits, judges who are disqualified are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 judges must vote to hear a case en banc. If 5 of the 12 judges are disqualified, all 7 of the non-disqualified judges would have to vote to take a case en banc.

- Four circuits use the "case majority" approach. In these circuits, judges who are disqualified are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the non-disqualified judges) would have to vote to take a case en banc.

- One circuit — the Third — uses the "modified case majority" approach. This approach works the same as the case majority approach, except that a case cannot

be taken en banc unless a majority of all judges — disqualified and non-disqualified — are eligible to vote on the question. Thus, a case in which 5 of the circuit's 12 active judges are disqualified can be heard en banc upon the votes of 4 judges; a majority of all judges would be eligible to vote, and a majority of those eligible to vote would have voted in favor of taking the case en banc. But a case in which 6 of the circuit's 12 active judges were disqualified cannot be taken en banc, even if all 6 non-disqualified judges vote in favor.

Members of the Advisory Committee have expressed the view that, given that there is both a national statute (28 U.S.C. § 46(c)) and a national rule (Rule 35(a)) addressing this issue, three very different practices should not exist within the circuits. The Advisory Committee will continue to work on this issue and may present an amendment to the Standing Committee at a later date.

The second potentially controversial matter on which the Advisory Committee is working is a proposal by the Department of Justice that the Appellate Rules be amended explicitly to permit the citation of non-precedential decisions. Members of the Advisory Committee favor such a rule, for a number of reasons, including the following:

- Currently, non-precedential decisions are the only source that parties are explicitly forbidden to cite. In some circuits, a party can cite an infinite variety of non-binding sources of authority — including everything from decisions of the courts of Great Britain to law review articles to op-ed pieces — but cannot cite a court to its own non-precedential opinions.

- Non-precedential decisions are widely cited in district courts and in state courts for their persuasive value. It is odd to have the non-precedential opinions of a court of appeals used to persuade district courts and state courts, but not used to persuade the very court that authored them. This is particularly awkward when a district court relies heavily on a non-precedential opinion in issuing a ruling, that ruling is appealed to the court of appeals, and the parties are not permitted to cite or discuss the non-precedential opinion on which the district court so heavily relied in deciding the case.

- Non-precedential decisions are widely available today — on the Internet and now in the Federal Appendix — and thus permitting citation of such decisions would no longer give a substantial advantage to the Justice Department, insurance companies, and other large, national litigators.

I should stress that the Justice Department's proposal addresses only the citation of non-precedential opinions; it does not in any way purport to tell courts whether or in what circumstances they can designate opinions as non-precedential.

I recently surveyed the chief judges about the Justice Department's proposal. I received a decidedly mixed response. The chief judges of the Third, Tenth, and Eleventh Circuits expressed support for the proposal; the chief judges of the First, Fourth, Eighth, Ninth, and Federal Circuits expressed opposition; the chief judge of the Sixth Circuit said that he would support a national rule, so long as it was similar to the Sixth Circuit's rule; and the chief judge of the Fifth Circuit said that the judges of her circuit were divided. No response was received from the chief judges of the Second, Seventh, or D.C. Circuits, although I have been informed that a written response from the Second Circuit is forthcoming.

The divisions among and within the circuits are reflected within the membership of the Advisory Committee. At this point, it appears to me that the Advisory Committee will eventually propose an amendment of some kind, although it is not yet clear to me exactly what form the proposed amendment will take.

We will continue to keep the Standing Committee informed of the deliberations of the Advisory Committee regarding these two matters.

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

FRAP Item	Proposal	Source	Current Status
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
			Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 09/97

FRAP Item	Proposal	Source	Current Status
	with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.		Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01

FRAP Item	Proposal	Source	Current Status
			Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Further minor revisions approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-06	Amend FRAP 4(b)(5) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00

FRAP Item	Proposal	Source	Current Status
			Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-01	Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to

FRAP Item	Proposal	Source	Current Status
			Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Alternative draft approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02

FRAP Item	Proposal	Source	Current Status
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice Discussed and retained on agenda 04/02
00-08	Amend FRAP 4(a)(6)(A) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion Draft approved 04/02 for submission to Standing Committee in 06/02
02-01	Amend Rule 27(d) to apply typeface and type-style limitations of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02

DRAFT

Minutes of Spring 2002 Meeting of
Advisory Committee on Appellate Rules
April 22, 2002
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2002, at 8:30 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Carl E. Stewart, Judge Stanwood R. Duval, Jr., Chief Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Charles R. "Fritz" Fulbruge III, the former liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and Mr. Christopher Jennings, law clerk to Judge Anthony J. Scirica (Chair of the Standing Committee).

Judge Alito introduced Judge Stewart, who replaced Judge Will Garwood as a member of the Committee. Judge Alito also introduced Ms. Waldron, who replaced Mr. Fulbruge as the liaison from the appellate clerks. Judge Alito thanked Mr. Fulbruge for his excellent service to the Committee.

II. Approval of Minutes of April 2001 Meeting

The minutes of the April 2001 meeting were approved by consensus.

III. Report on June 2001 and January 2002 Meetings of Standing Committee

Judge Alito asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2001 meeting, the Standing Committee approved for submission to the Judicial Conference all of the proposed amendments forwarded by this Committee. Only the proposed abrogation of Rule 1(b) occasioned substantial discussion and a

dissenting vote; all other proposed amendments were approved unanimously and with little or no discussion.

This Committee did not meet during the fall of 2001, and thus it had nothing to report at the January 2002 meeting of the Standing Committee.

IV. Action Items

A. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — names of legal holidays)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

Committee Note

Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as

"Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

The Reporter reminded the Committee that, at its April 2001 meeting, it had agreed to amend the Appellate Rules so that they referred to the third Monday in February as "Washington's Birthday" rather than as "Presidents' Day." The Reporter said that the draft amendment would implement this Committee's decision and would ensure that the Appellate Rules would be consistent not only with 5 U.S.C. § 6103(a), but also with the Criminal Rules, which have recently been restylized and retain references to "Washington's Birthday."

A member moved that the proposed amendments to Rules 26(a)(4) and 45(a)(2) be approved. The motion was seconded. The motion carried (unanimously).

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

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

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

Committee Note

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

Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period under subdivision (a)(6)(A) and about what kind of "notice" must be found lacking under subdivision (a)(6)(B) before the time to appeal may be reopened.

Subdivision (a)(6)(A). Subdivision (a)(6)(A) requires a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts have had difficulty agreeing upon what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that have addressed the question hold that only *written* notice is sufficient, although nothing in the text of the rule suggests such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit holds that while subdivision (a)(6)(A) does not require written notice, "the quality of the communication must rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 2002 WL 372927, at *4 (9th Cir. Feb. 5, 2002). It appears that verbal communications can be deemed "the functional equivalent of written notice" if they are sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits have suggested in dicta that subdivision (a)(6)(A) requires only "actual notice," which,

presumably, could include verbal notice that is not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits have read into subdivision (a)(6)(A) restrictions that have appeared only in subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that currently appear in neither subdivisions (a)(6)(A) nor (a)(6)(B) (such as a requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

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

All that is required to trigger the 7-day period under amended subdivision (a)(6)(A) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in subdivision (a)(6)(A) requires that the written notice be received from any particular source, and nothing requires that the written notice have been served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open subpart (A)'s seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 121 S. Ct. 2605 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has received written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received written notice. However, a verbal communication is not written notice for purposes of subdivision (a)(6)(A), no matter how specific, reliable, or unequivocal.

Subdivision (a)(6)(B). Prior to 1998, subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may be served by a party

pursuant to that same rule. In other words, subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

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

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

The Reporter said that Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. Under the rule, the concept of "notice" is important in two different respects. First, under subdivision (B), a party seeking to move to reopen the time to appeal a judgment must show that he or she did not receive "notice" of that judgment within 21 days after its entry. Second, under subdivision (A), a party must bring a motion to reopen the time to appeal a judgment no later than 7 days after receiving "notice" of its entry.

When Rule 4(a)(6) was adopted in 1991, it was clear that "subdivision (B) notice" was intended to be different from "subdivision (A) notice." Subdivision (B) notice was limited to notice formally served under Civil Rule 77(d), while Subdivision (A) notice encompassed any kind of notice from any source.

Two difficulties have arisen in interpreting Rule 4(a)(6) — one the fault of the courts and one the fault of this Committee.

The problem with Subdivision (A) notice is the fault of the courts. Although neither the text of the rule nor the Committee Note imposes any restrictions on the type of notice that suffices to trigger the seven-day window, a four-way circuit split has developed over the meaning of "notice" in Subdivision (A). At one extreme are courts that read the rule literally and hold that any kind of notice from any source suffices to trigger the seven-day window. At the other extreme are courts that hold that only formal notice served upon a party under Civil Rule 77(d) suffices. In the middle are courts that hold that the notice must be in writing, but need not be formally served. The Ninth Circuit takes the unique position that, although the notice need not be in writing, it needs to be in a form that is the "functional equivalent" of writing.

The Reporter said that the amendment that he had drafted to Subdivision (A) was intended to require written notice, but to define "written" broadly to include, in essence, anything that can be read, such as a website, e-mail message, or docket sheet. The Reporter also said that the amendment was intended to make clear that such written notice can come from any source and does not have to be formally served under Civil Rule 77(d).

The problem with Subdivision (B) notice is the fault of this Committee and results from a 1998 amendment to Rule 4(a)(6). Prior to 1998, it was clear that, if a party was entitled to notice of entry of judgment *under Civil Rule 77(d)* and the party did not receive notice *under Civil Rule 77(d)*, then the party could bring a motion to extend the time to appeal. After 1998, it is no longer clear what kind of notice must be lacking. The amendment to Rule 4(a)(6) broadened the type of "disqualifying" notice beyond notice served under Civil Rule 77(d) to include *any* kind of notice, and broadened the source of such notice from those authorized to serve notice under Civil Rule 77(d) (the *clerk* or a party) to others (the *court* or a party). Thus, under amended Subdivision (B), if a party is entitled to notice of entry of a judgment under Civil Rule 77(d), and the party does not receive either that notice or some other kind of (unspecified) notice from someone acting on behalf of the district court or another party, then the party is eligible to move to extend the time to appeal.

The Reporter said that this ambiguity in Subdivision (B) would almost surely lead to confusion and conflict in the circuits. He also said that, as far as he could tell, Subdivision (B) worked well before being amended in 1998. The Reporter said that the amendment was intended to restore Subdivision (B) to its pre-1998 simplicity: A party would be barred from bringing a motion to reopen the time to appeal only if that party received notice under Civil Rule 77(d) within 21 days. Any other kind of notice would not preclude a motion to reopen.

The Committee discussed the proposed amendment at length, focusing on four issues:

1. The Committee discussed whether to require that Subdivision (A) notice be in writing, as the Reporter had proposed. A couple of members argued that, for example, a phone call from the clerk of court should suffice to trigger the seven-day window. Other members responded that written communications are more susceptible of proof than oral communications and that we should try to avoid creating a situation where, for example, the clerk of court is called as a witness to testify about when he or she engaged in a phone conversation with an attorney. A member moved that Subdivision (A) be amended to require written notice. The motion was seconded. The motion carried (unanimously).

2. The Committee also discussed the definition of "written." Some members were uncomfortable with the Committee Note, which essentially made an "eyes/ears" distinction: Notice that is read is deemed "written," while notice that is heard is not. One member pointed out that a claim that a party learned of the entry of a judgment by visiting a website on a particular date is no more susceptible of proof than a claim that a party learned of the entry of a judgment in an oral conversation. However, after further discussion, the Committee concluded that a narrower definition of "written" would likely create more problems than it would solve.

3. As to Subdivision (B) notice, members agreed that the subdivision should be amended to eliminate the ambiguity identified by the Reporter. However, one member pointed out that the amendment was itself ambiguous. Under the amendment, Subdivision (B) would require that the court find "that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive such notice within 21 days after entry." The problem is with the words "entitled" and "such." Under Civil Rule 77(d), a party is "entitled" to notice of entry of the judgment only from the *clerk*. Thus, in referring to "such notice" — that is, the notice to which "the moving party was *entitled*" — amended Subdivision (B) must be referring to notice served by a *clerk*. But the Committee Note goes on to refer to receiving notice from *either* the clerk *or* any party. Since there is no entitlement to notice from a party, it is impossible for a party to provide "such" notice.

The Committee agreed that it wanted any kind of Civil Rule 77(d) notice — that is, either the notice that the clerk is obligated to serve or the notice that a party is authorized to serve — to suffice to cut off the right to bring a motion to reopen. The Committee struggled with trying to redraft the amendment to Subdivision (B) to say that. The Committee eventually agreed that Subdivision (B) should be redrafted to provide: "the court finds that the moving party did not receive notice under Civil Rule 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry."

4. A member moved that Subdivision (A) be redesignated as Subdivision (B) and that Subdivision (B) be redesignated as Subdivision (A). She argued that the rule would read more clearly if it first described the formal notice of entry of judgment whose absence entitles a party to move to reopen the time to appeal and then described the informal notice that triggers the

seven-day deadline to bring the motion. The motion was seconded. The motion carried (unanimously).

The Reporter agreed to present a redrafted amendment to Rule 4(a)(6) at the next Committee meeting. One member asked that the Committee Note be shortened. He complained generally of the burden that long Notes impose on practitioners who, while in court, rely upon the popular soft-covered West compilations. Other members disagreed, pointing out that Notes are also intended to serve judges and lawyers who are doing research in their offices and trying to understand the reasons why a rule was amended. When an amendment seeks to address a complicated problem — or when the Committee can anticipate future difficulties that will arise in interpreting an amendment — longer Notes can be helpful and can save courts and attorneys work in the long run.

A member said that she had trouble with the "tenses" when reading the Note — that is, she had to concentrate to figure out when the Note was describing a past version of Rule 4(a)(6), when the Note was describing the present version, and when the Note was describing the amended version. The Reporter said that he would try to make the "tenses" clearer when redrafting the Note.

C. Item No. 00-12 (FRAP 28, 31 & 32 — cover colors in cross-appeals)

Mr. Letter introduced alternative sets of proposed amendments and Committee Notes regarding briefing in cross-appeals. The first set would amend Rules 28(c), 28(h), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B) — that is, it would address the issue through amendments to several existing rules. The second set would address the issue primarily through a new Rule 28A, although a couple of existing rules (e.g., Rule 32(a)(2) regarding the covers of briefs) would also be amended. (The draft amendments and Committee Notes are found under Tab IV-C in the agenda book.)

Mr. Letter said that the rules on cross-appeals vary from circuit to circuit, sometimes in significant ways. For example, in one circuit the parties to a cross-appeal are permitted to serve a total of three briefs, while in most circuits they are permitted a total of four. Among the circuits that permit four briefs, there are differing rules regarding the length of those briefs and the colors of their covers. As a result, the Justice Department and other litigants with national practices frequently have to get extensive guidance from clerks' offices.

The Committee discussed this issue at its April 2001 meeting and asked the Department to prepare three alternative proposals:

- a proposal that would address these issues through amendments to several existing rules;

- a proposal that would combine all provisions applicable to briefs filed in cross-appeals into one new rule; and

- a proposal that would treat cross-appeals as two separate consolidated cases.

Mr. Letter said that the Department had considered and rejected the last proposal (treating cross-appeals as two separate cases). Under that proposal, instead of the appellee/cross-appellant filing a single brief that acts both as a principal brief on the merits of the cross-appeal and as a response to the brief of the appellant/cross-appellee on the appeal, the appellee/cross-appellant would file two separate briefs — a response in the first appeal and a principal brief in the second appeal. And instead of the appellant/cross-appellee filing a single brief that acts both as a response brief in the cross-appeal and a reply brief in the appeal, the appellant/cross-appellee would file a reply brief in the first appeal and a response brief in the second appeal. This would significantly increase the number of pages that would have to be drafted by parties and considered by courts and create problems regarding cross-references and other matters.

Mr. Letter said that the Department had drafted a new Rule 28A that would consolidate *most* provisions regarding cross-appeals into one rule. Mr. Letter said that it was probably not advisable to consolidate *all* such provisions into one rule; for example, the colors of the covers of briefs would most logically be addressed in Rule 32(a)(2). Mr. Letter said that the Department was indifferent as between adopting a new Rule 28A or amending several existing rules.

Judge Alito identified the following issues for the Committee: (1) Should there be more extensive national rules on briefing in cross-appeals? (2) Should cross-appeals be treated like two separate consolidated appeals with separate briefing in each case? (3) If cross-appeals are to be treated differently than consolidate appeals, how many briefs should the parties serve in a cross-appeal? (4) What should the length of each of those briefs be? (5) What color should the covers of those briefs be?

The Committee quickly reached a consensus that FRAP should be amended to provide national rules governing briefing in cross-appeals and that cross-appeals should not be treated like separate, consolidated appeals. The Committee also quickly reached consensus that a total of four briefs should be permitted in cross-appeals:

Brief One: The appellant/cross-appellee's principal brief on the merits of the appeal.

Brief Two: The appellee/cross-appellant's response to Brief One and principal brief on the merits of the cross-appeal.

Brief Three: The appellant/cross-appellee's response to Brief Two on the cross-appeal and reply to Brief Two on the appeal.

Brief Four: The appellee/cross-appellant's reply to Brief Three on the cross-appeal.

The Committee had a lengthy discussion regarding word limitations. At the April 2001 meeting, the Justice Department had proposed that Brief One be limited to 14,000 words, Brief Two to 16,500 words, Brief Three to 14,000 words, and Brief Four to 7000 words. This would give the appellant/cross-appellee a total of 28,000 words, and the appellee/cross-appellant a total of 23,500 words. The proposal of the Department was consistent with the local rules adopted by the majority of the circuits, except that most circuits limit Brief Two to 14,000 words. At the April 2001 meeting, the Committee decided, over the objection of the Department, that Brief Two should be limited to 14,000 words. Mr. Letter asked the Committee to reconsider its decision.

A member asked whether two separate word limits could apply to Brief Three. The cross-appeal may raise only a minor issue, one that the appellant/cross-appellee could easily address in 1000 words. In this situation, the appellant/cross-appellee is essentially allowed to file a 13,000-word reply brief. Other members thought it impracticable to try to assign word limits to portions of Brief Three, as it is often difficult to distinguish which part of Brief Three is responding to the cross-appeal and which part is replying to Brief Two's response to the appeal. Mr. Fulbruge said that the clerks would have difficulty enforcing such a rule.

The Committee debated at length whether to approve the word limitations recommended by the Department of Justice or whether instead to limit Brief Two to 14,000 words. Those in favor of the Department's proposal cited the fact that, even under the proposal, the appellant/cross-appellee gets 4,500 more words than the appellee/cross-appellant. Limiting Brief Two to 14,000 words would increase that disparity to 7,000 words, which would be unfair to the appellee/cross-appellant, especially in cases in which both parties are equally aggrieved and the denomination of one as the "appellant" simply reflects who got to the courthouse first. Although clerks have the discretion to allow longer briefs, clerks can be unpredictable in their exercise of that discretion.

Other members argued against the Department's proposal, and argued that Brief Two should be limited to 14,000 words, as it is in most circuits. One member even expressed support for limiting Brief One and Brief Two to 14,000 words, and Brief Three and Brief Four to 7,000 words. These members argued that, generally speaking, appellate courts do not suffer from too little briefing. To the contrary, judges are plagued by overly long briefs. In rare cases in which the appellee/cross-appellant needs more than 14,000 words in Brief Two, it can seek permission from the clerk. The main effect of raising the general limit on Brief Two to 16,500 words will be that hundreds of appellees/cross-appellants will lard their briefs with 2,500 needless words. As to the disparity between the overall words allotted to the appellant/cross-appellee and the appellee/cross-appellant, these member argued that there is little correlation between the size of the brief and its effectiveness. Moreover, the appellant is generally the more aggrieved party — and generally has more work to do in its briefs — and thus some disparity is justified.

A member moved that the Department's proposal be approved. The motion was seconded. The motion carried (5-4).

The Committee agreed by consensus with the Department's proposal that the cover on Brief One be blue, on Brief Two red, on Brief Three yellow, and on Brief Four gray. The Committee also agreed by consensus that, rather than attempt to address the issue of briefing in cross-appeals in a separate rule, several of the existing rules should be amended. The Reporter agreed that he would carefully review the draft amendments and Committee Notes presented by the Department, edit them as necessary, and present them at the next meeting of the Committee.

D. Item No. 00-13 (FRAP 29 — preclusion of amicus briefs)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 29. Brief of an Amicus Curiae

(a) When Permitted.

(1) **Government Briefs.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.

(2) **Other Briefs.** Any other amicus curiae may file a brief only:

(A) by leave of court or

(B) if the brief states that all parties have consented to its filing.

(3) **Rejection of Briefs.** A court may reject a brief filed under Rule 29(a)(2)(B) if consideration of that brief would result in the disqualification of a judge.

Committee Note

Subdivision (a). Rule 29(a) gives the government the right to file an amicus-curiae brief without seeking the leave of the court or the consent of the parties. As to all others, Rule 29(a) permits the filing of an amicus-curiae brief only "by leave of court or if the brief states that all parties have consented to its filing."

Rule 29(a) may be understood to provide that, when all parties consent to the filing of a private amicus-curiae brief, the court has no alternative but to consider the brief. That, in turn, may open the door to the strategic use of amicus-curiae briefs to force the disqualification of particular judges. For example, someone might hire the sibling of a judge to file an amicus-curiae brief, knowing that such a filing will likely result in the disqualification of the judge under 28 U.S.C. § 455 or the Code of Conduct for United States Judges. Even when an amicus-curiae brief has not been filed for the purpose of disqualifying a judge — but nevertheless has that effect — the benefit to the court of maintaining the original panel or the full en-banc court may outweigh the benefit to the court of receiving the amicus-curiae brief.

Rule 29(a) has been amended to make clear that, even when all parties have consented to the filing of a private amicus-curiae brief, the court may act on its own initiative to reject that brief if its consideration would result in the disqualification of a judge. After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). If the court does not want to consider a private amicus brief, Rule 29(a) should not force it to do so.

The Reporter said that the judges of the First Circuit were concerned about the fact that, under Rule 29(a), leave of court is not necessary to file a "private" amicus brief if "all parties have consented to its filing." The particular concern of the First Circuit is with the strategic use of amicus briefs to force the disqualification of particular judges. For example, if someone hired the sibling of a judge to prepare and file an amicus brief, that judge would likely feel obligated to disqualify himself or herself.

The Reporter recommended that this suggestion be removed from the study agenda. The Reporter said that it was hard for him to imagine that the situation feared by the First Circuit occurs often. The situation would arise only if all of the parties affirmatively consented to the filing of an amicus brief and if that brief resulted in the disqualification of one of the members of the panel assigned to hear the case (or one of the members of the en banc court). Presumably, it would be a rare brief that would both receive the consent of all parties and cause such a disqualification. The Reporter said that he could not find a single instance in which anyone tried such a tactic, much less succeeded. Moreover, with one exception, he could not find anything that addressed this tactic in the local rules of the courts of appeals, which also suggests that it has not been a problem. Given that Rule 29(a) has remained unchanged in relevant part since the adoption of the Federal Rules of Appellate Procedure in 1967, and given that there is no evidence that the problem feared by the First Circuit has actually arisen, the Reporter said that he recommended that the Committee decline to amend Rule 29(a).

The Reporter continued that, if the Committee disagreed, it could proceed in one of two ways. First, the Committee could simply delete the provision that permits amicus briefs to be filed without leave of court. That would allow the court to ascertain before ruling on the motion whether permitting the brief to be filed would result in the disqualification of any judge. However, it would also increase the workload of the court, as motion practice would be necessary whenever a private party sought to file an amicus brief. Second, the Committee could amend Rule 29(a) so that the rule continued to permit a brief to be "filed" without leave of the court if all parties consent, but also provided explicitly that the court may "reject" such a brief if its consideration would result in the disqualification of a judge. The amendment and Committee Note drafted by the Reporter take the latter approach.

A couple of members spoke in favor of amending the rule. One expressed the concern that, as judges are required to disclose more and more detailed information about their investments, the strategic use of amicus briefs could increase. Another pointed out that, in many cases, the parties consent to the filing of amicus briefs without giving it much thought, opening the door to the strategic use of such briefs. He said that the judges of the D.C. Circuit shared the concern of the judges of the First Circuit. He said that the concern went beyond parties intentionally using amicus briefs to disqualify judges; amicus briefs filed in good faith that trigger judicial disqualifications can also be problematic.

Other members spoke against amending the rule. A member said that the Appellate Rules should not be amended to address problems that occur rarely if ever. Another member agreed and said that, given that amici are not parties, the ability to use amicus briefs strategically is quite limited.

A member pointed out the practical difficulties of trying to bring about the result desired by the First Circuit. In all cases, the attorneys would have to do the work of preparing the brief, and the court would have to do the work of reading the brief. Under the first option described by the Reporter, attorneys would always have to ask permission to file the completed brief, and courts could say "no." Under the second option, courts could always reject the completed brief after it was filed. Under both options, then, a brief that an amicus had spent time and money to prepare could be rejected even though every party to the case had consented to its filing.

After further discussion, a member moved that Item No. 00-13 be removed from the Committee's study agenda. The motion was seconded. The motion carried (8-1).

E. Item No. 01-05 (change references to "19__" in forms)

The Reporter pointed out that four of the five forms attached to the Appellate Rules refer to "the ___ day of _____, 19__" (Forms 1 and 2), "entered on _____, 19___" (Form 3), or "entered in this case on _____, 19___" (Form 5). He recommended that the Committee change the forms to refer to "20___" instead of to "19___."

A member moved that the change be made. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 95-03 (new FRAP 15(f) — prematurely filed petitions to review)

Judge Alito said that Item No. 95-03 arose out of a suggestion by Judge Stephen Williams of the D.C. Circuit, a former member of this Committee. In 1995, Judge Williams recommended that a new Rule 15(f) be added to the Appellate Rules to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such review-blocking petition. Judge Williams's suggestion was inspired by Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions.

The Committee approved a proposal to add such a Rule 15(f), and the proposal was published for comment in August 2000. In response, Judge A. Raymond Randolph, the Chief Judge of the D.C. Circuit, wrote to the Committee and expressed the "unanimous" and "strong" opposition of the Circuit's judges and its Advisory Committee on Procedures to proposed Rule 15(f). In light of that opposition, this Committee deferred further action on Rule 15(f).

Judge Alito said that he had talked to Judge Williams, and that Judge Williams confirmed that his colleagues were strongly opposed to new Rule 15(f). Judge Alito said that, given that the problem that Rule 15(f) is intended to solve is a problem affecting mainly the D.C. Circuit, and given the strong opposition of that circuit to the proposed rule, the proposed rule had little chance of clearing the Standing Committee or the Judicial Conference. For that reason, Judge Alito asked the Committee to remove Item No. 95-03 from the study agenda.

A couple of members affirmed that they continued to believe that proposed Rule 15(f) makes sense on the merits. There is a "trap" in the D.C. Circuit, and, unless the Appellate Rules are amended to fix that trap, it will continue to be easy for litigants unknowingly to forfeit their right to appellate review of agency action. However, these members also acknowledged the political realities of the situation and the fact that Item No. 95-03 had now been pending on the study agenda for seven years.

A member moved that Item No. 95-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

B. Item No. 97-31 (FRAP 47(a)(1) — uniform effective date for local rule changes) and Item No. 98-01 (FRAP 47(a) — conditioning effectiveness of local rules on filing with Administrative Office)

The Reporter reminded the Committee that, at its April 1998 meeting, it approved an amendment to Rule 47(a) that would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The Committee later decided not to submit this amendment to the Standing Committee because of several concerns. First, members of the Standing Committee and this Committee have expressed concern that prescribing a uniform effective date for changes to local rules would violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Second, the A.O. has expressed concern that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Finally, the rules of practice and procedure should not differ on these points. If there is to be a uniform effective date for changes to local rules, or if there is to be a requirement that local rules be filed with the A.O., then those provisions should appear in all of the rules of practice and procedure, and not just in the Appellate Rules.

The Reporter suggested that it might be time to remove Item Nos. 97-31 and 98-01 from the study agenda. At its January 2002 meeting, the Standing Committee engaged in a lengthy discussion of the proliferation of local rules, in the context of a review of the progress of the new Local Rules Project. In the course of that discussion, several members of the Standing Committee expressed reservations about these two proposals. Moreover, the other advisory committees reported either that their members had objections to the proposals or that working on similar proposals was not a high priority for them.

The Reporter also said that it seems clear that no action regarding local rules is going to be taken by the Standing Committee until the Local Rules Project completes its work and submits its recommendations. The recommendations that relate to all of the rules of practice and procedure are likely to be considered by a joint working group, consisting of members of all of the advisory committees. Prof. Coquillette agreed. He said that the Local Rules Project will likely present a tentative report to the Standing Committee in June 2002 and a final report in January 2003. Prof. Coquillette also suggested that, in light of the issue regarding 28 U.S.C. § 2071(b), the Standing Committee may deem it prudent to work with Congress on a legislative solution to the local rules problem.

A member moved that Item Nos. 97-31 and 98-01 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

C. Item No. 99-05 (FRAP 3(c) — failure explicitly to name court to which appeal taken)

The Reporter reminded the Committee that, at its April 2000 meeting, it removed from its study agenda a proposal that Rule 3 be amended to prevent the dismissal of an appeal when a notice of appeal does not explicitly name the court to which the appeal is taken, but only one court of appeals has jurisdiction over the appeal. The proposal had been placed on the study agenda after a panel decision of the Sixth Circuit created a circuit conflict on this issue. *See United States v. Webb*, 157 F.3d 451 (6th Cir. 1998). The proposal was removed from the study agenda after the en banc Sixth Circuit eliminated the circuit conflict by overturning the decision of the panel. *See Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc).

Public Citizen Litigation Group has asked that this proposal be restored to the Committee's study agenda. The Reporter said that, in his opinion, there is no reason to do so. The circuits that have addressed the issue continue to be unanimous that dismissal of an appeal is not necessary under these circumstances. And, in the wake of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it is extremely unlikely that a future circuit split will develop. The Supreme Court specifically stated in *Becker* that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, *to which appellate court*." *Id.* at 1808 (emphasis added).

A couple of members agreed with the Reporter. A member moved that Item No. 99-05 not be restored to the study agenda. The motion was seconded. The motion carried (unanimously).

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

The Reporter said that Item No. 99-09 arose out of a suggestion by Judge Scirica that this Committee study the way that the circuit courts process requests for certificates of appealability ("COAs") and consider whether the Appellate Rules should be amended to bring about more uniformity. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

The Department reported back to the Committee at its April 2001 meeting. The Department argued, and the Committee agreed, that the variation in circuit procedure was not creating a problem for litigants and that this Committee should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The Committee concluded that this matter should be removed from its study agenda, with one exception.

The Department complained that, in some circuits, the government is required to file a brief on the merits before the court decides whether to grant a COA. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department proposed that this

Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether to grant a COA.

Members of this Committee expressed opposition to the Department's proposal for various reasons, which are described in the minutes of the April 2001 meeting. The Committee did not vote on the Department's proposal, but suggested to the Department that it reconsider whether it wanted to pursue its proposal, given the opposition of several Committee members.

The Reporter said that Mr. Letter had informed him that the Department had decided to withdraw its proposed amendment, and thus that Item No. 99-09 could be removed from the Committee's study agenda. Mr. Letter responded that, subsequent to talking with the Reporter, he had learned that the United States Attorneys were interested in presenting a more limited version of the proposal to which this Committee had reacted negatively in April 2001. By consensus, the Committee agreed to leave this item on the study agenda so that the Department can pursue this matter further.

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal filed on behalf of a corporation is signed only by one of the corporation's officers, and not by an attorney. Judge Motz feared that the Fourth Circuit might create a conflict over this issue with the Ninth Circuit. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999).

Judge Motz said that this item can be removed from the study agenda. The Fourth Circuit issued its decision and agreed with the Ninth Circuit. *See Amzura Enters., Inc. v. Ratcher*, 18 Fed.Appx. 95 (4th Cir. 2001). Also, in light of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it was highly unlikely that any circuit would disagree with the Fourth and the Ninth in the future.

A member moved that Item No. 00-05 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

F. Item No. 00-07 (FRAP 4 — specify time for appeal of Hyde Amendment order)

At the request of Judge Duval, this Committee placed on its study agenda the question whether an appeal from an order granting or denying an application for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) should be governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). The circuits have split over this question.

During a discussion of this issue at its April 2001 meeting, Committee members described similar issues over which the circuits have disagreed. The Justice Department offered to try to identify all instances in which there are disagreements over which appellate deadline should be applied to an order disposing of a "civil-type" motion brought in connection with a criminal proceeding. The Department also offered to try to draft an amendment to address the problem.

Mr. Letter gave a status report on the Department's efforts. He said, in essence, that the problem had turned out to be very complicated, and that the Department had not yet settled upon a solution. He said that he would have more to report at the next meeting of the Committee.

One member asked the Department to consider a rule that would state simply that Rule 4(b) would apply to appeals from judgments of conviction or sentence, and that Rule 4(a) would apply to all other appeals. Under this approach, Rule 4(a) would govern all post-judgment motions in criminal cases. A member responded that such an approach would change existing law as to some appeals and would probably not be as easy to administer as it sounds. For example, would Rule 4(a) or 4(b) apply to appeals of orders denying FRCrP 35(c) motions (motions to correct a sentence "imposed as a result of arithmetical, technical, or other clear error")? If the answer is Rule 4(a), do we really want defendants to have 60 days to appeal an order denying a FRCrP 35(c) motion?

Ms. Waldron stated that most post-judgment motions in criminal proceedings are made pro se — often by movants who are imprisoned in a jurisdiction that is not the same as the jurisdiction in which the motion must be made — and thus a universal 60-day deadline for such motions might be fairer. Ms. Waldron also pointed out that there is uncertainly over the deadline that applies to orders disposing of motions made under 18 U.S.C. § 3582(c)(2) (which authorizes a prisoner to move to reduce his sentence if a favorable change is made to the sentencing guidelines).

A member suggested that the Committee consider abolishing the distinction between civil and criminal appeals and give litigants against the United States 60 days to appeal all judgments or orders, regardless of the type of case in which they are entered. He said that giving defendants 60 days to appeal instead of 10 days would not create much delay or cause much harm to parties. Any defendant who wants to do so can file an appeal in one day; thus, a longer appellate deadline would not hurt defendants. The only party who might be prejudiced is the government, which might have to wait longer to get a conviction affirmed. That is not a compelling objection.

A member asked whether defendants need a longer period of time in which to appeal in criminal cases in order to secure counsel for the appeal. A member responded that they did not. In a typical case, after a defendant is convicted, the last act of his trial attorney will be to file a notice of appeal. Filing a notice of appeal is quick and easy.

A couple of members said that they would be more comfortable with a rule that addresses specifically — on a category-by-category basis — which deadlines apply to which orders. To date, the Justice Department has identified only a handful of orders whose appellate deadlines are in doubt. Rather than crafting a sweeping general rule, which could have unanticipated consequences and eventually create as many problems as it solves, these members would rather try to address each problem as it arises.

A member moved that the Justice Department be asked to draft an amendment that would specifically address each order whose appellate deadline is in dispute. The motion was seconded. The motion carried (unanimously).

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

At its April 2001 meeting, this Committee asked the Federal Judicial Center ("FJC") to study the way that the courts of appeals have implemented 28 U.S.C. § 46(c) and Rule 35(a), both of which require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc. In particular, the Committee asked the FJC to describe how the circuits have addressed the question of whether judges who are disqualified are counted in calculating what constitutes a "majority."

Ms. Leary reported that the FJC had surveyed all 13 circuits on this question, and that three different approaches appear to be in use:

> Eight circuits use the **"absolute majority" approach**. In these circuits, judges who are disqualified are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 judges must vote to hear a case en banc. If 5 of the 12 judges are disqualified, all 7 of the non-disqualified judges would have to vote to take a case en banc.
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> Four circuits use the **"case majority" approach**. In these circuits, judges who are disqualified are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the non-disqualified judges) would have to vote to take a case en banc.
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> One circuit — the Third — uses the **"modified case majority" approach**. This approach works the same as the case majority approach, except that a case cannot be taken en banc unless a majority of all judges — disqualified and non-disqualified — are eligible to vote on the question. Thus, a case in which 5 of the circuit's 12 active judges are disqualified can be heard en banc upon the votes of 4 judges; a majority of all judges would be eligible to vote, and a majority of those eligible to vote would have voted in favor of taking the case en banc. But a case in which 6 of the circuit's 12 active judges

were disqualified cannot be taken en banc, even if all 6 non-disqualified judges vote in favor.

Ms. Leary reported that, in all 13 circuits, a judge who is temporarily unavailable because of travel, illness, or another reason is counted in the base — that is, is considered an active, non-disqualified judge. Ms. Leary also reported that only minor differences existed among the circuits in the treatment of senior judges.

Prof. Mooney said that when Judge Kenneth Ripple chaired this Committee, and she served as the Committee's Reporter, the Committee had approved a uniform rule on this issue. The Committee's proposal caused a firestorm of protest among the chief judges, who were nearly unanimous in their belief that this is a matter of court administration that should be left to each circuit to decide for itself. Prof. Mooney said that she disagreed with the chief judges. There is both a national statute (28 U.S.C. § 46(c)) and a national rule (Rule 35(a)) addressing this issue, and there is no reason why three different interpretations of these national standards should exist in the circuits. That said, Prof. Mooney warned that the chief judges were quite adamant that this Committee should not try to bring about uniformity.

A member said that he would favor amending Rule 35(a) to impose a consistent national standard. He also objected to the absolute majority approach on the ground that it essentially permits a disqualified judge to count as a "no" vote. The disqualification of a judge should not result in the equivalent of a vote either for or against rehearing en banc; it should, as much as possible, be a neutral. The member said that he would favor the case majority rule.

Another member agreed. He pointed out that disqualifications seem to be more common. He also pointed out that, under the absolute majority rule, one judge can effectively control the law of a circuit. Suppose, for example, that a circuit has 12 active judges and that, in a particular case, 5 of those 12 judges are disqualified. Even if 6 of the 7 non-disqualified judges wish to take a case en banc, the case cannot be heard en banc, because 6 is not a majority of 12. This permits just one active judge — perhaps sitting on a panel with a visiting judge and a senior judge — effectively to control circuit precedent, even over the objections of all 6 of his non-disqualified colleagues.

A member pointed out that an even worse result is possible: If, on such a panel, the one active judge is in dissent, and the visiting judge and senior judge are in the majority, the law of a circuit could be set by *zero* active judges over the objections of all 7 of the non-disqualified active judges.

Prof. Coquillette said that, although he did not disagree with these members on the merits, he concurred with Prof. Mooney's statements about the likely views of the chief judges. Any attempt by this Committee to impose a uniform standard on the circuits will be met with fierce resistence. A member agreed. He said that the opposition will take two forms: (1) Some chief judges will oppose any uniform national standard, on the grounds that each circuit should

be free to set its own rules; and (2) Some chief judges will accept a national standard, as long as it imposes their circuit's rule on all of the other circuits.

A couple of members expressed their frustration at the likely opposition of the chief judges. They reiterated that there already *are* national standards that address this question; the conflict arises because circuits interpret 28 U.S.C. § 46(c) and Rule 35(a) differently. They also pointed out that there is no good reason for this practice to vary among circuits; this is not a situation in which varying local conditions need to be accommodated through different rules. Prof. Coquillette pointed out that, according to the Rules Enabling Act, the purpose of the rules of practice and procedure is "to maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073(b). In other words, Congress equated maintaining consistency with promoting justice.

One member said that the root of the problem is *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), in which the Supreme Court essentially indicated that it was up to each circuit to interpret 28 U.S.C. § 46(c) for itself.

A member said that, while she did not disagree that there should be a uniform national standard, she was not convinced that the absolute majority approach was wrong. The absolute majority rule has the advantage of discouraging en banc hearings and making certain that circuit law binding on all future panels is not set by a minority of the circuit's active judges. If the absolute majority rule insulates a bad decision from en banc review, then the Supreme Court can fix the error, or the en banc court can overturn the panel decision when the issue arises in another case.

A member argued that this Committee should propose a national rule. Even if that proposal is defeated by the Standing Committee or the Judicial Conference, it might call Congress's attention to the problem and result in statutory reform.

The Committee adjourned at 12:00 noon for lunch and reconvened at 1:20 p.m.

A member moved that this Committee propose amending Rule 35(a) to resolve the conflict over the treatment of disqualified judges. The motion was seconded. The motion carried (unanimously).

The Committee continued to discuss *how* the conflict should be resolved. Several members spoke in favor of the modified case majority approach of the Third Circuit. That approach requires a majority of those judges who are eligible to vote, and thus does not count every recusal as a "no" vote. At the same time, that approach requires that a majority of active judges be eligible to vote, which guards against en banc decisions being issued by a minority of judges.

A member said that horror stories are still possible under the Third Circuit approach. For example, if 6 of 12 active judges are disqualified, a 2-1 panel with a visitor and senior in the majority can still set circuit precedent that no active member of the circuit supports. Other members agreed that such horror stories are possible, but horror stories are possible under any of the three approaches, and the Third Circuit approach seems to do the best job of minimizing them.

A member moved that Rule 35(a) be amended to adopt the modified case majority approach of the Third Circuit. The motion was seconded. The motion carried (unanimously). The Reporter said that he would prepare an implementing amendment and Committee Note and present it at the next meeting.

H. Item No. 01-01 (citation of unpublished decisions)

Judge Alito said that he had surveyed the chief judges of the circuits about the Justice Department's proposal that the Appellate Rules be amended explicitly to permit the citation of non-precedential decisions. He received a decidedly mixed response. The chief judges of the Third, Tenth, and Eleventh Circuits expressed support for the proposal; the chief judges of the First, Fourth, Eighth, Ninth, and Federal Circuits expressed opposition; the chief judge of the Sixth Circuit said that he would support a national rule, so long as it was similar to the Sixth Circuit's rule; and the chief judge of the Fifth Circuit said that the judges of her circuit were divided. No response was received from the chief judges of the Second, Seventh, or D.C. Circuits.

Mr. Letter pointed out that recent actions of several circuits suggest more openness to the Department's proposal. Among other things, the D.C. Circuit, which used to have a very restrictive rule, now permits the citation of all of its non-precedential decisions.

The Committee debated at some length whether it should propose *a* national rule on this topic. Those speaking in favor of a national rule pointed out the following:

- Currently, non-precedential decisions are the only sources that parties are explicitly forbidden to cite. In some circuits, a party can cite an infinite variety of non-binding sources of authority — including everything from decisions of the courts of Great Britain to law review articles to op-ed pieces — but cannot cite a court to its own non-precedential opinions.

- Non-precedential opinions are widely cited in district courts and in state courts; although they are not binding, they sometimes can be persuasive. It is odd to have the non-precedential opinions of a court of appeals used to persuade district courts and state courts, but not used to persuade the very court that authored them. This is particularly odd when a district court relies heavily on a non-precedential opinion in issuing a ruling, that ruling is appealed to the court of appeals, and the

parties are not permitted to cite or discuss the non-precedential opinion on which the district court so heavily relied in deciding the case.

- The no-citation rule borders on raising civil liberties concerns. This is the one place where a court rule specifically forbids an attorney from making an argument that the attorney believes will help her client.

- Non-precedential decisions are widely available today — on the Internet and now in the Federal Appendix — and thus permitting citation of such decisions would no longer give a substantial advantage to the Justice Department, insurance companies, and other large, national litigators.

- Prohibitions on the citation of unpublished opinions give parties an incentive to play games to find ways of hinting to the court that it has issued non-precedential opinions on a point.

- Liberalizing the rule will not "open the floodgates." Practitioners will continue to have an incentive not to cite non-precedential decisions as to do so is tantamount to admitting that no precedential decision supports one's position.

- The Department's proposal addresses only the citation of non-precedential opinions. It does not in any way purport to tell courts whether or in what circumstances they can designate opinions as non-precedential.

Those speaking against a national rule pointed out the following:

- There continues to be substantial opposition to such a rule among the chief judges of the circuits. Those chief judges make up half of the membership of the Judicial Conference, and the district court judges who make up the other half are likely to defer to the circuits on this proposal.

- Many circuit judges will view this as the first step on a path that will eventually lead to the abolition of non-precedential opinions, which are unpopular among practitioners but essential for the survival of the federal appellate courts.

- The caseload of appellate judges does not permit them to devote substantial time to writing careful opinions in every case. Judges are able to get non-precedential opinions out quickly precisely because they know that the opinions will not be cited. Forcing all circuits to permit citation of non-precedential opinions will ensure either that decisions are rendered much more slowly or that more cases are disposed of without *any* opinion. Both options would be worse for parties and counsel than the current situation.

- The no-citation rule does not deprive the courts and litigants of anything of value. Because non-precedential opinions are not written with as much care, and particularly because they usually say little about the facts, the opinions are of almost no value to anyone but the parties.

- The amount of published case law has grown exponentially, and it is getting more and more difficult for judges and practitioners to keep up with precedential decisions. They should not also be burdened with having to keep up with the huge number of non-precedential decisions.

- Circuits forced to allow citation to their non-precedential opinions will simply make their opinions so cryptic as to be useless to anyone but the parties.

Following the discussion, a member moved that the Appellate Rules should be amended to include *a* national rule permitting the citation of non-precedential decisions. The motion was seconded. The motion carried (6-3).

The Committee then discussed the specifics of the draft Rule 32.1 proposed by the Justice Department. Several members argued that subdivision (a)(2) of the proposed rule was unnecessary. That subdivision states that "[a]n unpublished or non-precedential decision may be cited if a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue." Members pointed out that it would be odd for a litigant to cite a non-precedential opinion if the litigant did not "believe[] that it persuasively addresses a material issue." In addition, the subdivision makes the propriety of citing a non-precedential decision turn upon the subjective intent of a litigant, which is an unusual and potentially troublesome way of framing a rule about citing cases. Mr. Letter responded that (a)(2) was meant to be exhortatory — to encourage attorneys to think carefully before citing non-precedential decisions.

The Reporter argued that, in putting so many conditions upon the citation of non-precedential decisions, the rule was undermining the arguments of its proponents. Proponents of the rule argue, persuasively in the Reporter's view, that non-precedential decisions should not be treated any differently than other types of non-precedential authority, such as the decisions of state or foreign courts or law review articles. No rule regulates the citation of these sources; for example, no rule provides that these sources can only be cited in "support [of] a claim of res judicata" or "if a party believes that [the authority] persuasively addresses a material issue in the appeal." By imposing such restrictions on the citation of non-precedential decisions, the draft rule seems to be buying into the notion that there is something "wrong" with non-precedential opinions that is not "wrong" with law review articles or other non-precedential authorities.

A member agreed with the Reporter and pointed out that, by restricting the citation of non-precedential opinions, the draft rule would give rise to a cottage industry of litigation over whether a particular non-precedential opinion was or was not cited in violation of the rule. It

would be better for everyone if the rule stated simply that non-precedential opinions could be cited, period. Nothing forces courts to read those opinions or be persuaded by them.

Other members, while not contesting the force of these arguments on the merits, argued that the restrictions on the citation of non-published opinions were politically expedient in that they would increase the chances that the rule would be approved by the Standing Committee and Judicial Conference.

The Committee also discussed whether subdivision (b) of the proposed rule was necessary. That subdivision requires a party to provide copies to the court and to the other parties of all non-precedential decisions that the party cites. The Reporter argued that the effect of this rule would be to force parties cumulatively to serve hundreds of thousands of pages of photocopied opinions, when, in most circumstances, hard copies are not necessary given that judges and parties can easily find non-precedential opinions on line or in the Federal Appendix. Members generally agreed with the Reporter and discussed two possible alternatives: first, requiring parties to serve copies of non-precedential opinions only "upon request," and second, requiring parties to serve copies of non-precedential opinions only if they are not "available on line."

A member of the Committee said that references in the proposed rule to "unpublished or non-precedential decisions" should be changed to refer just to "non-precedential decisions." The word "unpublished" has become a misnomer, especially given that many "unpublished" opinions are now being published in the Federal Appendix.

A member moved that the proposal of the Justice Department be approved, except that the rule should refer only to "non-precedential" decisions and subdivision (b) of the rule should be changed so that parties are not required to serve copies of all non-precedential decisions that they cite. The motion was seconded. The motion carried (6-3). The Reporter agreed to prepare a cleaned-up draft of the proposed rule for the Committee to consider at its next meeting.

I. Item No. 01-02 (replace all page limits with word limits)

The Reporter stated that, at the last meeting of the Committee, members had discussed a proposal that all of the page limits in the Appellate Rules — including those in Rules 5(c), 21(d), 27(d)(2), 35(b)(2), and 40(b) — be replaced with word limits. Although several members had spoken in opposition to the proposal, the Committee had not taken any formal action. The Reporter recommended that this item be removed from the study agenda, largely for the reasons given at the April 2002 meeting.

A member moved that Item 01-02 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

J. Item No. 01-03 (FRAP 26(a)(2) — interaction with "3-day rule" of FRAP 26(c))

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." As of December 1, 2002, Rule 26(a)(2) will provide that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 11 days, and included when the period of time is 11 days or more. The ambiguity is this: In deciding whether a deadline is "less than 11 days," should the court count the 3 days that are added to the deadline under Rule 26(c)?

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail. If the 3 days *are* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline is *not* "less than 11 days," intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline *is* "less than 11 days" for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

The Reporter said that, while he agreed with Mr. Wepner that this problem should be addressed, he recommended that the Civil Rules Committee be asked to take the lead on proposing a solution. The problem is one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees.

It makes sense for the Civil Rules Committee to take the lead on this matter. The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions. By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

A member moved that this Committee formally request that the Civil Rules Committee take the lead in proposing a solution to this problem. The motion was seconded. The motion carried (unanimously).

K. Item No. 01-04 (FRAP 4(b)(1)(A) — give criminal defendants 30 days to appeal)

Under Rule 4(b), a defendant generally has 10 days to bring an appeal in a criminal case, whereas the government generally has 30 days. At the April 2001 meeting of the Committee, the Justice Department was asked to make a recommendation on a proposal that Rule 4(b) be amended to give both the defendant and the government 30 days to appeal in criminal cases.

Mr. Letter said that the Department opposed the proposal. He said that the Justice Department prosecutors have not noticed a problem with the current rule nor heard complaints from criminal defense attorneys about the 10-day deadline. Filing a notice of appeal is a simple thing, and those convicted of crimes are generally anxious to get their appeals started as soon as possible. In a typical case involving appointed trial counsel, the attorney files a notice of appeal as a matter of course. The 30-day deadline for the government is justified by the fact that the government, unlike the typical criminal defendant, is a large organization, and it takes time for the government to decide whether to pursue an appeal. If time for the government to appeal were shortened, the government would have to respond by filing protective notices of appeal in almost all cases.

A member agreed with Mr. Letter that filing a notice of appeal in a criminal case is a routine matter for the defendant and should not take more than 10 days. It is common for appointed trial counsel to file a notice of appeal as her last act, often on the same day that the judgment of conviction is entered.

A member said that, if the issue were viewed in isolation, he would be inclined not to change the rule. But the member said that he was concerned about the difficulty that courts are having distinguishing "civil" motions from "criminal"motions in trying to decide whether the time limitations of Rule 4(a) or 4(b) apply to an appeal of an order disposing of a motion. Giving all parties 30 or 60 days in all cases — or giving the government 60 days in all cases, and all other parties 30 days in all cases — would obviate the need to make that distinction, while not really harming the judicial system or any party.

Other members expressed the view that the current system does not appear to be "broke," and thus they are disinclined to "fix" it, especially in an area that is a focus of as much litigation as appellate deadlines.

A member moved that Item No. 01-04 be removed from the study agenda. The motion was seconded. The motion carried (8-1).

L. Items Awaiting Initial Discussion

1. Item No. 02-01 (FRAP 27(d) — apply typeface and type-style limitations of FRAP 32(a)(5)&(6) to motions)

Item No. 02-01 was added to the Committee's study agenda by Mr. Fulbruge, who pointed out that, apparently because of an oversight, the restylized Appellate Rules do not prescribe limitations on typeface or type style for motions. The Reporter said that it would be easy to amend Rule 27(d)(1) to add a subsection (E) that would incorporate by reference the typeface limitations of Rule 32(a)(5) and type style limitations of Rule 32(a)(6). By consensus, the Committee decided to ask the Reporter to prepare such an amendment for the next meeting of the Committee.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Fall 2002 Meeting

The Committee will next meet on November 18 and 19, 2002, in San Francisco.

VIII. Adjournment

By consensus, the Committee adjourned at 3:30 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

B. Summary of Proposed Changes to Rule 41.

1. Addition of Definitions.

The Committee has added two new definitional provisions in amended Rule 41(a)(2). Rule 41(a)(2)(D) addresses the definitions of "domestic terrorism" and "international terrorism," which are terms used in Rule 41(b)(2), and Rule 41(a)(2)(E) references the definition of "tracking device." Rather than define those terms in the rule itself, the rule cross-references the pertinent federal statute where the terms are defined.

2. Authority to Issue Tracking-Device Warrants.

In General

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. The Committee was persuaded to expressly include such warrants in Rule 41. Although such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, Rule 41 currently provides no procedural guidance for those judicial officers who are asked to issue tracking-device warrants. As with traditional search warrants for persons or property, tracking-device warrants may implicate law enforcement interests in multiple districts, and warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy.

Scope of Authority; Inside or Outside the District

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install or use a tracking device. The magistrate judge's authority to allow installation of a tracking device includes the authority to permit maintenance and removal of the tracking device. The proposed amendment is grounded on the understanding that the device will assist officers only in tracking the movements of a person or property. It is important to note that under the proposed amendment, the warrant could authorize officers to track the person or property within the district of issuance, or outside the district.

Authority to Issue Tracking-Device Warrants Limited to Federal Judges

The Committee recognized that even in those cases where officers have no reason to believe initially that a person or property will move outside the district, issuing a warrant to authorize tracking both inside and outside the district avoids the need to obtain multiple warrants if the property or person later crosses district or state lines. Because the authorized tracking may involve more than one district or state, the Committee believed that only federal judicial officers should be authorized to issue this type of warrant.

3. Obtaining a Tracking-Device Warrant

Rule 41(d) includes new language on tracking devices. Although the tracking-device statute, 18 U.S.C. § 3117, does not set out a standard an applicant must meet to install a tracking device, the Supreme Court has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The Committee did not attempt to resolve that issue in Rule 41. Instead, the amendment simply provides that if probable cause is shown, the magistrate judge must issue the warrant.

4. Contents of Tracking-Device Warrants

Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking-device warrants. In order to avoid open-ended monitoring of tracking devices, the Committee included a provision that requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, the rule permits officers to seek extensions of time for good cause. The rule also specifies that any installation of a tracking device authorized by the warrant must be made within 10 calendar days and, unless otherwise provided, that any installation occur during daylight hours. The Committee considered, but rejected, applying more stringent or detailed interim time requirements within the 45-day limit, such as those contained in Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520.

5. Execution and Return of Tracking-Device Warrants

The Committee completely revised Rule 41(f) to accommodate the new provisions for tracking-device warrants. Current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking-device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking-device warrants.

Revised Rule 41(f)(2)(A) provides that the officer must note on the warrant the time the device was installed and the period during which the device was used. Under new Rule 41(f)(2)(B), the officer must return the tracking-device warrant to the magistrate judge designated in the warrant, within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the problems of serving a copy of a tracking-device warrant on the person who has been tracked, or whose property has been tracked. The amendment requires the officer to serve a copy of the tracking-device warrant on the person within 10 calendar days after the tracking has ended. That service

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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JUDICIAL CONFERENCE OF THE UNITED STATES
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EVIDENCE RULES

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

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 13, 2002**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26, 2002 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included at Appendix D.

This Report addresses two action items: approval of Rule 41 for publication and comment and approval of the restyled Rules Governing § 2254 and § 2255 Proceedings, for publication and comment, and several information items.

II. Action Items—Summary and Recommendations.

The Committee has been considering several key proposals involving Rule 41, Search Warrants, for some time. In addition, the Standing Committee approved the Committee's proposal to restyle the Rules Governing § 2254 and § 2255, often simply referred to collectively as the "habeas" rules. The Committee has completed its initial

work on these proposed amendments and recommends that they be approved for publication and comment.

III. Action Item—Proposed Amendments to Rule 41. Search Warrants.

A. In General.

Although Rule 41 was part of the restyling amendments, recently approved by the Supreme Court, the Committee determined that several substantive changes should be studied further. In the meantime the Committee recommended additional amendments to Rule 41 in response to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001; those amendments were later approved by the Judicial Conference and were blended into the style package recently approved by the Supreme Court.

In preparing the Style package of amendments last year, the Committee included for public comment a proposal to provide coverage in Rule 41 for what is sometimes referred to as the "sneak and peek" search (or "covert" search), where officers obtain a search warrant to enter a premises and look around, without taking anything and without notifying the owner of the entry until much later. The public comment revealed a number of unresolved issues, so the Committee withdrew that proposal from the package of proposed amendments and also determined that it would be beneficial to review the possibility of including some coverage of tracking-device warrants in Rule 41. Those matters were referred to the Rule 41 Subcommittee, chaired by Judge Tommy Miller. The subcommittee was also asked to review the USA PATRIOT Act and determine whether any other provision in that Act affected, or required an amendment to, the Rules of Criminal Procedure.

The Subcommittee ultimately recommended to the Committee that: (1) no further action should be taken, at this time, to address the issue of "sneak and peek" searches in Rule 41; (2) it would be beneficial for counsel and magistrates for the Committee to address the issue of tracking-device warrants; and (3) the Committee should include a provision in Rule 41 recognizing the authority of a magistrate to delay the notice required by Rule 41. At the April 2002 meeting, the Committee approved the Subcommittee's proposed amendments to Rule 41 and its recommendation that no action be taken on "sneak and peek" searches.

The proposed amendments to Rule 41 and the accompanying Committee Note are attached in Appendix A.

may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant.

6. Delayed Notice for Any Type of Search.

As noted above, the Rule 41 Subcommittee reviewed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 to determine if any provision in that Act required an amendment to Rule 41. As a result of its study, the Subcommittee recommended, and the Committee accepted, a proposal to include a new provision, Rule 41(f)(3), to reflect 18 U.S.C. § 3103a(b). That new statutory provision authorizes a court to delay any notice required in conjunction with the issuance of any search warrants. The new provision in Rule 41 permits the government to request, and the magistrate judge to grant, a delay in giving any notice required in Rule 41.

Recommendation—The Committee recommends that Criminal Rule 41 be approved and published for public comment.

IV. Action Item—Proposed Substantive and Restyling Amendments to Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings and Accompanying Forms.

A. In General; Background.

For the last four years, the Committee has considered a number of proposed amendments to the Rules Governing § 2254 Proceedings and § 2255 Proceedings. Those proposed changes were driven in large part by passage of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. As a result of that study, the Committee in 2000 published several substantive amendments to those rules for public comment. Following the comment period, the Committee decided to withdraw the proposed amendments for two reasons. First, the comments on the amendments pointed out other substantive issues that might be addressed. And second, it was clear that the rules were ripe for restyling.

Following completion of its restyling efforts for the Criminal Rules in 2001, the Committee sought approval from the Standing Committee to restyle the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings. That approval was granted in June 2001. Mr. Joe Spaniol and Professor Joe Kimble prepared an initial draft of the rules, which in turn was referred to the "Habeas Rules Subcommittee," chaired by Judge David Trager. The Subcommittee reviewed the draft, met several times during the early months of 2002, and recommended that the Committee approve both style and substantive amendments to the rules and seek approval to publish the rules for public comment.

In restyling the rules, the Committee generally followed the pattern it had developed in restyling the Criminal Rules and focused on several key points. First, the Committee has attempted to standardize (where possible) key terms and phrases that appear throughout the rules.

Second, in several rules, the Committee has deleted provisions that it believed were no longer necessary or required. Whether those constitute substantive changes is not always clear. See current Rule 9(a), concerning delayed petitions or motions, which was rendered of questionable viability by 28 U.S.C. §§ 2244(d) and 2255, para. 6.

Third, the Committee has attempted to avoid any unforeseen substantive changes and has attempted in the Committee Notes to clearly state where the Committee is making what it considers to be a "substantive" change. Where a real question has arisen as to whether a particular change is substantive in nature, the Committee has identified it as such.

Fourth, several rules have been reorganized to make them easier to read and apply. In some, sections from one rule have been transferred to another rule.

Fifth, in some rules, major substantive changes have been made. *See, e.g.*, Rules 2 and 3 (requirement that clerk file deficient petition or motion). Some of those changes, (*see, e.g.*, Rule 9 dealing with successive petitions or motions) have been under discussion for some time but were deferred pending the restyling effort. Still others were identified and included during the project.

A copy of the proposed rules are at Attachment B along with proposed Committee Notes. The rules are presented in a side-by-side format with the current rule on the left column and the proposed restyled rules in the right column.

B. Substantive Amendments to Rules Governing §§ 2254 and 2255 Proceedings.

In restyling the rules, the Committee considered a number of substantive amendments to the rules, some of which were required to make the rules consistent with the Antiterrorism and Effective Death Penalty Act of 1996. Others were considered and adopted because of changes in practices. The more significant substantive amendments are noted in the following discussion.

1. Filing Petitions and Motions that do Not Conform to the Rules.

Prior to the Antiterrorism and Effective Death Penalty Act of 1996, defective petitions and motions were usually rejected and returned to the petitioner or moving party. The Act, however, created a one-year statute of limitations and thus a court's rejection of a petition or motion, simply because it does not conform to the rules, may effectively bar the prisoner from ever having his or her claims considered. *See*

§ 2244(d)(1) and § 2255, para. 6 (1-year statute of limitations). To avoid that problem the Committee has proposed that Rule 2(e) of the § 2254 rules and Rule 2(d) of the § 2255 rules be eliminated and that a new provision be added in Rule 3(b) of each set of rules. The new provision parallels Rule 5 of the Federal Rules of Civil Procedure and requires the clerk to file petitions and motions, even if they are in some way defective. If they are defective, the Committee envisions that the court would direct the petitioner or moving party to correct them.

2. Delayed Petitions and Motions.

Current Rule 9 in both sets of rules covers delayed petitions and motions and successive petitions and motions. After considering the issue, the Committee decided by a vote of 10 to 1, with one abstention, to delete current Rule 9(a) from the rules. The Committee concluded that it was no longer necessary in light of the one-year statute of limitations. In addition, current Rule 9(b), which deals with successive petitions was revised to reflect the requirement in the AEDPA that a petitioner or moving party must first seek approval from the appropriate court of appeals to file a second or successive petition or motion.

3. Replies by Petitioners and Moving Parties to Government Response.

Rule 5 in both sets of rules addresses the government's response to a petition or motion. But the current rules make no mention of the possibility of a petitioner's or moving party's reply to that response. The Committee is aware that in some districts, the court permits the petitioner or moving party to file a reply, particularly in those cases where they may have a response to the government's claim that a statute of limitations or exhaustion of remedies claim bars the petition or motion. To address that issue the Committee, by a vote of 12-0, added new Rule 5(e).

C. Restyled Rules.

The following discussion notes the proposed style changes to the rules and other changes that are less significant substantive amendments to the rules. The titles of the rules in this discussion are as they appear in the current rules. Because the rules are very similar for Sections 2254 and 2255, they are presented here in tandem, unless otherwise noted. At one time the Committee considered whether to attempt to blend the two sets of rules into one combined set. It concluded, however, that doing so would not be feasible, given the differences in the underlying statutes and in key terminology in the rules themselves.

Rule 1. Scope of Rules. The Committee proposes only minor style changes to Rule 1. In restyling the rules the Committee considered, but rejected, a proposal to include a specific reference to § 2241 habeas petitions in Rule 1 of the § 2254 rules. The current rules doe not do so and it was the view of the

Committee that current Rule 1(b) provides adequate notice that the rules may be used for habeas petitions not otherwise covered under Rule 1(a).

Rule 2. Petition (Motion). In addition to style changes, as noted above, the Committee deleted Rule 2(e) in the § 2254 Rules and Rule 2(d) in the § 2255 Rules, dealing with the court's return of an insufficient petition or motion. The Committee also deleted the language in current Rule 2(c), which requires the petitioner or moving party to specify all grounds for possible relief, including those that were, or reasonably should have been, known by the petitioner or moving party; members of the Committee believed that this language was probably unnecessary in light of the AEDPA.

The Committee also modified the language in the rule that currently requires that the papers be signed personally by the petitioner or moving party under penalty of perjury; the Committee recognized that § 2242 permits someone representing the petitioner or moving party to sign the document.

The Committee also decided that Rule 2 should not list all of the information that might be required of the petitioner or moving party. Instead, the requested information will be noted on the forms themselves.

Rule 3. Filing Petition. As noted above, the Committee added new Rule 3(b) that would require the clerk to accept an otherwise insufficient petition or motion. Also, the Committee added a new Rule 3(c) that would call attention to the one-year statute of limitations. In the § 2254 Rules the cite is to § 2244(d) and in the § 2255 Rules the reference is to § 2255, para. 6. Finally, the Committee added a new provision, Rule 3(d) that spells out when a paper filed by an inmate, using an institution's internal mailing system, is considered to have been filed.

Rule 4. Preliminary Consideration by Judge. Current Rule 4 requires that certain documents be sent by "certified mail" to the parties. The Committee changed the wording to reflect that the documents must be served on the parties, which could certainly include but is not limited to, using the mails. Further, the Committee changed the provision in Rule 4 of the § 2254 rules concerning service of the petition on the State's Attorney General. The Committee is aware that in some states, service of the petition is more appropriately made on some other state officer. Thus, the proposed amendment to Rule 4 requires service of the petition on the Attorney General or another appropriate state officer.

Rule 5. Answer; Contents. In addition to minor style changes (including creation of new subdivision headings), the Committee has included a requirement in Rule 5(d) of the § 2254 rules that would require the respondent to supply the court with copies of any briefs it had submitted to an appellate court, and any opinions and dispositive orders from that appellate court.

Rule 6. Discovery. The Committee made minor style changes to Rule 6.

Rule 7. Expansion of Record. The Committee made minor style changes to Rule 7, which include moving the text of Rule 7(d) to revised Rule 7(a).

Rule 8. Evidentiary Hearing. In addition to style changes in Rule 8, the Committee amended the rule to provide that copies of proposed findings and recommendations will be served on the parties; the current rule provides that the copies are to be mailed.

Rule 9. Delayed or Successive Petitions (Motions). In addition to style changes to Rule 9, the Committee amended the rule to specifically reference the need to obtain approval from the appropriate court of appeals, a requirement imposed by the AEDPA.

Rule 10. Powers of Magistrate. Only minor style changes have been made to Rule 10.

Rule 11, § 2254 Proceedings. Applicability of Rules of Civil Procedure. Rule 11, Rules Governing § 2254 Proceedings, contains only minor style changes.

Rule 11, § 2255 Proceedings. Time for Appeal. Rule 11, Rules Governing § 2255 Proceedings, contains only minor style changes.

Rule 12, § 2255 Proceedings. Applicability of Rules of Civil Procedure and Rules of Criminal Procedure. The Committee made minor style changes to Rule 11 of the § 2255 Rules.

D. Revised Official Forms Accompanying the Rules Governing §§ 2254 and 2255 Proceedings.

The Committee has also modified and updated the official forms that accompany the Rules Governing §§ 2254 and 2255 Proceedings. The changes are stylistic in nature and reflect the proposed changes to the rules and changes required by the AEDPA, for example, information regarding successive petitions or motions. The Committee is particularly interested in receiving comment on the lists of possible grounds for relief in question #12. A copy of the proposed forms are at Appendix C.

Recommendation—The Committee recommends that the Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings be approved and published for public comment.

V. Information Items

A. Rule 35. Correcting or Reducing a Sentence.

Prior to the restyling efforts for the Rules of Criminal Procedure, Rule 35(c) permitted the court to correct an error in the sentence within 7 days of the "imposition of sentence." During the restying project, Rule 35(c) was moved to Rule 35(a) and the term "sentencing" was substituted for "imposition of sentence." While the rule was out for public comment, as part of the comprehensive style package, the Committee gave further consideration to that amendment, at the urging of the Appellate Rules Committee. The concern was that the more common triggering event for appeal purposes was the entry of the judgment.

In June 2001, the Standing Committee approved publication of a proposed amendment to Rule 35. In that amendment, proposed new Rule 35(a) includes a definition of "sentencing" — only for purposes of Rule 35 — and "sentencing" means "entry of the judgment." The Comment period for that proposed amendment ended on February 15, 2002.

The Committee received seven written comments. The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The public comments opposing the amendment cite, among other things, concerns about interjecting more uncertainty into the area, leaving open for too long the possibility of the court changing the sentence, and adopting the minority, rather than majority view of the circuit courts that have addressed the issue. At least one commentator noted that the rule as proposed creates a special definition for "sentencing" that normally does not apply to other rules, such as Rule 32. Those endorsing the amendment believed that it will clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

Currently the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. *See United States v. Aguirre*, 214 F.3d 1122, 1125-26 (9th Cir. 2000) (citing cases). The Committee opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

At its April 2002 meeting the Committee considered the public comments and the caselaw on the topic, and it decided that for purposes of Rule 35 the term sentencing should mean "oral announcement of the sentence." Rather than including a special definition for sentencing in the Rule itself, the Committee decided to substitute the term

"oral announcement of the sentence" whenever the term "sentencing" was used. After the meeting, it became apparent that that approach presented drafting problems.

Thus, the Committee has decided to hold the proposed amendment to Rule 35 until it has had an opportunity to discuss the matter further at its Fall 2002 meeting.

B. Model Local Rule Regarding Electronic Filing in Criminal Cases

At its April 2002 meeting the Committee considered a proposed set of model local rules dealing with electronic filings in criminal cases and offered its views on possible changes to those rules. The model rules had been originally developed for civil cases by a subcommittee of the Committee on Court Administration and Management (CACM). The Judicial Conference ultimately approved that rule. In light of the fact that some courts will now be able to accept electronic filings in criminal cases, the subcommittee chair of CACM on electronic filing, Judge John Koeltl (S.D.N.Y), offered suggested changes to the existing model local rule to accommodate criminal cases. The revised rule was also forwarded to Judge Fitzwater, chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure, who in turn has asked the members of that subcommittee to review the attached draft and offer any comments or suggestions to the Committee.

The Committee was asked to review the draft and offer any suggested changes. The Committee held an extended discussion on what, if any, special problems might arise with electronic filings in criminal cases, including access by the parties and the public generally to any, or all, of the filed documents and whether any special rules should be applied for papers signed by the defendant.

The Committee, by a vote of 10-2, recommended that the rules be changed to reflect that all charging documents be filed in their original form or in scanned format, in the court's discretion, and that everything signed by the defendant could be filed in the original or in scanned format, at the discretion of the court.

The Committee understands that the proposed local rules are designed to provide only preliminary guidance to the courts that wish to experiment with electronic filings in criminal cases. After the courts have used the system, further changes may be in order.

C. Other Proposed Amendments Under Consideration by the Committee

The Committee has under active consideration several amendments to the Criminal Rules and will continue its discussion of those proposed amendments at its Fall 2002 meeting:

- **Rule 12.2. Notice of Insanity Defense; Mental Examination**

The Committee will consider a possible amendment to Rule 12.2 concerning sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

- **Rules 29, 33, and 34; Proposed Amendments re Rulings by Court**

Rules 29, 33, and 34 require that motions under those rules be filed within 7-day of the times specified in those rules; in the alternative the moving party may obtain an extension of time if the court fixes a different time for filing the motions. However, the court must fix that time within the original 7-day period specified in each rule. The Committee has considered the case where the defendant files an extension of time within the 7 days but due to the judge's illness or absence, the judge does not, within the 7-day limit, extend the deadline. At least one Circuit had ruled that the 7-day limit is jurisdictional. The Committee has agreed to proceed with an amendment to address that concern and will consider possible language at its next meeting.

- **Rule 32.1. Revoking or Modifying Probation or Supervised Release**

As noted in *United States v. Frazier*, ____ F.3d _____ (11th Cir. 2002), there is no explicit provision in Rule 32.1 for the defendant's right to allocution. The Committee has decided to amend Rule 32.1 to address that point. That amendment will be on the agenda for the Committee's Fall 2002 meeting.

- **Proposed Rule Regarding Appeal of Rulings by Magistrate Judges**

Finally, at the suggestion of Judge Tashima, the Committee has decided to proceed with drafting an amendment, or possibly a new rule, that would parallel Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive, pretrial matters.

Attachments.

A. Proposed Amendments to Criminal Rules 41.
B. Proposed Amendments to Rules Governing §§ 2254 & 2255 Proceedings
C. Proposed Forms Accompanying Rules Governing §§ 2254 & 2255 Proceedings
D. Minutes of April 2002 Meeting

APPENDIX A

[Copy of Rule 41 and Note]

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) ***Definitions.*** The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district —

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* New material is underlined; matter to be omitted is lined through.

or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — ~~having~~ with authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or

property within or outside that district~~.~~; and

(4) a magistrate judge with authority in the district may issue a warrant to install within the district a tracking device, to use a tracking device, or both; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ~~***Probable Cause***~~ ***In General.*** After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install or use a tracking device ~~under Rule 41(c)~~.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the

daytime, unless the judge for good cause expressly authorizes execution at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify the length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions of no more than 45 days each. The warrant must command the officer to:

(i) complete any installation authorized

by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.***

* * * * *

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on ~~its face~~ it the exact date and time it ~~is~~ was executed.

~~(2)~~(B) *Inventory*. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

~~(3)~~(C) *Receipt*. The officer executing the warrant must: ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ must leave a copy of the warrant and receipt at the place where the officer took

the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it — together with the copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the

officer executing the warrant must return it to the magistrate judge designated in the warrant.

(C) *Service*. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with someone of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the

government, the magistrate judge may, on one or more occasions, for good cause extend the time to serve the warrant for a reasonable period.

(3) ***Delayed Notice.*** Upon request of the government, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking-device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g.*, *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking-device warrants. As with traditional search warrants for persons or property, tracking-device warrants may implicate law enforcement interests in multiple districts. Further, warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo*, *supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's home raised Fourth Amendment concerns).

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install or use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority to allow installation of a tracking device includes the authority to permit maintenance and removal of the tracking device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant

to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g., United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking-device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge must issue the warrant. And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking-device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause.

The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking-device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking-device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking-device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking-device warrant to the magistrate judge designated in the warrant, within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking-device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking-device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking-device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property

is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to delay any notice required in conjunction with the issuance of any search warrants.

RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2254

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:	**(a) Cases Involving a Petition under 28 U.S.C. § 2254.** These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:
(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and	(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and
(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.	(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.
(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.	**(b) Other Cases.** The district court may apply these rules to a habeas corpus petition not covered by Rule 1(a).

COMMITTEE NOTE

The language of Rule 1 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 2. Petition	Rule 2. The Petition
(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.	**(a) Current Custody; Naming the Respondent.** If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.
(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.	**(b) Future Custody; Naming the Respondents and Specifying the Judgment.** If the petitioner is not yet in custody — but may be subject to future custody — under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief against the state-court judgment being contested.
(c) Form of Petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.	**(c) Form.** The petition must: (1) specify all the grounds for relief available to the petitioner; (2) briefly summarize the facts supporting each ground; (3) state the relief requested; (4) be typewritten or legibly handwritten; and (5) be signed under penalty of perjury.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.	(d) **Standard Form.** The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make blank forms available to petitioners without charge. (e) **Separate Petitions for Judgments of Separate Courts.** A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.
(e) Return of insufficient petition. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.	

COMMITTEE NOTE

The language of Rule 2 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 2(c)(5) has been amended by removing the requirement that the petition be signed personally by the petitioner. As reflected in 28 U.S.C. § 2242, an application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person.

The language in new Rule 2(d) has been changed to reflect that a petitioner must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the

amended rule, there is no stated preference. The Committee understood that current practice in some courts is that if the petitioner first files a petition using the national form, that courts may ask the petitioner to supplement it with the local form.

Current Rule 2(e), which provided for returning an insufficient petition, has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with petitions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

Rule 3. Filing Petition	Rule 3. Filing the Petition; Inmate Filing
(a) Place of filing; copies; filing fee. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.	**(a) Where to File; Copies; Filing Fee.** An original and two copies of the petition must be filed with the clerk and must be accompanied by: (1) the applicable filing fee, or (2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.
(b) Filing and service. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.	**(b) Filing.** The clerk must file the petition and enter it on the docket. **(c) Time to File.** The time for filing a petition is governed by 28 U.S.C. § 2244(d). **(d) Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended except as described below.

The last sentence of current Rule 3(b), dealing with an answer being filed by the respondent, has been moved to revised Rule 5(a).

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective petition may pose a significant penalty for a petitioner who may not be able to file a corrected petition within the one-year limitation period. The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2. Thus, revised 3(b) requires the clerk is required to file a petition, even though it may otherwise fail to comply with Rule 2.

Revised Rule 3(c), which sets out a specific reference to 28 U.S.C. § 2244(d), is new and has been added to put petitioners on notice that a one-year statute of limitations applies to petitions filed under these Rules.

Rule 3(d) is new and provides guidance on determining whether a petition from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review; Serving the Petition and Order
The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.	The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer or other pleading within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The requirement that in every case the clerk of the court must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. § 2252, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.

Rule 5. Answer; Contents	Rule 5. The Answer and the Reply
The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post- conviction proceeding.	**(a) When Required.** The respondent is not required to answer the petition unless a judge so orders. **(b) Addressing the Allegations; State Remedies.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by any affirmative defense, including a failure to exhaust state remedies, a procedural bar, or a statute of limitations.
The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted.	**(c) Transcripts.** The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.
If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.	**(d) Briefs on Appeal and Opinions.** The respondent must also file with the answer a copy of: (1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

	(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence. **(e) Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the petition, unless a judge so orders, is taken from current Rule 3(b). Revised Rule 5(d) includes new material. First, Rule 5(d)(2), requires a respondent – assuming an answer is filed – to provide the court with a copy of any brief submitted by the prosecution to the appellate court. And Rule 5(d)(3) now provides that the respondent also filed copies of any opinions and dispositive orders of the appellate court concerning the conviction or sentence. These provisions are intended to insure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition.

Finally, revised Rule 5(e) reflects the practice in some jurisdictions that a petitioner has an opportunity to file a response, or other pleading, to the respondent's answer. In that case, the Rule prescribes that the court set the time for such responses. In lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Rule 6. Discovery	Rule 6. Discovery
(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).	**(a) Leave of Court Required.** A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure but may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.	**(b) Requesting Discovery.** When requesting discovery, a party must include a statement of any interrogatories or requests for admission, and a list of any requested documents.
(c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.	**(c) Deposition Expenses.** If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 7. Expansion of Record	Rule 7. Expanding the Record
(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.	**(a) In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the merits of the petition. The judge may require the parties to authenticate these materials.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party**. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

Rule 8. Evidentiary Hearing	Rule 8. Evidentiary Hearing
(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.	**(a) Determining Whether to Hold a Hearing.** If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
(b) Function of the magistrate. (1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition. (2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties. (3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. (4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.	**(b) Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.	**(c) Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

The requirement in current Rule 8(b)(2) that a copy magistrate judge's findings must be promptly mailed to all parties, has been changed in revised Rule 8(b) to require that copies of those findings be served on all parties. As used in this rule, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Petitions	Rule 9. Successive Petitions
(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.	
(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.	Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition.

COMMITTEE NOTE

The language of Rule 9 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as noted below.

First, current Rule 9(a) has been deleted as being unnecessary, in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214.

Second, current Rule 9(b), now Rule 9, has been changed to also reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, which now require a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition. *See* 28 U.S.C. § 2244(b)(3).

Finally, the title of Rule 9 has been changed to reflect the fact that the only topic now addressed in the rule is that of successive petitions.

Rule 10. Powers of Magistrates	Rule 10. Powers of a Magistrate Judge
The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.	If authorized to do so under 28 U.S.C. § 636, a magistrate judge may perform the duties of a district judge under these rules.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 11. Federal Rules of Civil Procedure; Extent of Applicability	Rule 11. Applicability of the Federal Rules of Civil Procedure
The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.	The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied to a proceeding under these rules.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2255

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255: (1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and	These rules govern a motion filed in a United States district court under 28 U.S.C. § 2255 by: **(a)** a person in custody under a judgment of that court who seeks a determination that: (1) the judgment violates the Constitution or laws of the United States; (2) the court lacked jurisdiction to enter the judgment; (3) the sentence exceeded the maximum allowed by law; or (4) the judgment or sentence is otherwise subject to collateral review; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.	**(b)** a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that: (1) future custody under a judgment of the district court would violate the Constitution or laws of the United States; (2) the district court lacked jurisdiction to enter the judgment; (3) the district court's sentence exceeded the maximum allowed by law; or (4) the district court's judgment or sentence is otherwise subject to collateral review.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 2. Motion	Rule 2. The Motion
(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.	**(a) Applying for Relief.** The application must be in the form of a motion to vacate, set aside, or correct the sentence.
(b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.	**(b) Form.** The motion must: (1) specify all the grounds for relief available to the moving party; (2) briefly summarize the facts supporting each ground; (3) state the relief requested; (4) be typewritten or legibly handwritten; and (5) be signed under penalty of perjury. **(c) Standard Form.** The motion must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make blank forms available to moving parties without charge.
(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.	**(d) Separate Motions for Separate Judgments.** A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

(d) Return of insufficient motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.	

COMMITTEE NOTE

The language of Rule 2 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 2(b)(5) has been amended by removing the requirement that the motion be signed personally by the moving party. As reflected in 28 U.S.C. § 2242, an application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person.

The language in new Rule 2(c) has been changed to reflect that a moving party must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understood that current practice in some courts is that if the moving party first files a motion using the national form, that courts may ask the moving party to supplement it with the local form.

Current Rule 2(d), which provided for returning an insufficient motion has been deleted. The Committee believed that the approach in Rule of Civil Procedure 5(e) was more appropriate for dealing with motions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the motion was deemed insufficient. Now that a one-year statute of limitations applies to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a motion because it is not in proper form may pose a significant penalty for a moving party, who may not be able to file another motion within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a motion, even though it may otherwise fail to comply with the provisions in revised Rule 2(b). The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2(b).

Rule 3. Filing Motion	Rule 3. Filing the Motion; Inmate Filing
(a) Place of filing; copies. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.	**(a) Where to File; Copies.** An original and two copies of the motion must be filed with the clerk.
(b) Filing and service. Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.	**(b) Filing and Service.** The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then deliver or serve a copy of the motion on the United States attorney in that district, together with a notice of its filing. **(c) Time to File.** The time for filing a motion is governed by 28 U.S.C. § 2255 ¶ 6. **(d) Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to

comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective motion may pose a significant penalty for a moving party who may not be able to file a corrected motion within the one-year limitation period. The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2. Thus, revised 3(b) requires the clerk is required to file a motion, even though it may otherwise fail to comply with Rule 2.

Revised Rule 3(c), which sets out a specific reference to 28 U.S.C. § 2255, paragraph 6, is new and has been added to put moving parties on notice that a one-year statute of limitations applies to motions filed under these Rules.

Rule 3(d) is new and provides guidance on determining whether a motion from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review
(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.	(a) **Referral to Judge.** The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.
(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.	(b) **Initial Consideration by Judge.** The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the government to file an answer or other pleading within a fixed time, or to take other action the judge may order.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 5. Answer; Contents	Rule 5. The Answer and the Reply
(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.	**(a) When Required.** The respondent is not required to answer the motion — or move with respect to it — unless a judge so orders. **(b) Addressing the Allegations; Other Remedies.** The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
(b) Supplementing the answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.	**(c) Records of Prior Proceedings.** If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings. **(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the motion, unless a judge so orders, is taken from current Rule 3(b).

Finally, revised Rule 5(d) reflects the practice in some jurisdictions that the moving party has an opportunity to file a response, or other pleading, to the respondent's answer. In that case, the Rule prescribes that the court set the time for such responses. In lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Rule 6. Discovery	Rule 6. Discovery
(a) Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).	**(a) Leave of Court Required.** A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.	**(b) Requesting Discovery.** When requesting discovery, a party must include a statement of any interrogatories or requests for admission, and a list of any requested documents.
(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.	**(c) Deposition Expenses.** If the government is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 7. Expansion of Record	Rule 7. Expanding the Record
(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.	**(a) In General.** If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the merits of the motion. The judge may require the parties to authenticate these materials.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

Rule 8. Evidentiary Hearing	Rule 8. Evidentiary Hearing
(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.	**(a) Determining Whether to Hold a Hearing.** If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
(b) Function of the magistrate. (1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition. (2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties. (3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. (4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.	**(b) Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed finding of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.	**(c) Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.
(d) Production of statements at evidentiary hearing. (1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.	**(d) Producing a Statement**. Federal Rule of Criminal Procedure 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The requirement in current Rule 8(b)(2) that a copy magistrate judge's findings must be promptly mailed to all parties, has been changed in revised Rule 8(b) to require that copies of those findings be served on all parties. As used in this rule, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Motions	Rule 9. Successive Motions
(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.	
(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.	Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion.

COMMITTEE NOTE

The language of Rule 9 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Current Rule 9(a) has been deleted as being unnecessary, in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214.

The remainder of revised Rule 9 reflects provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, which now require a moving party to obtain approval from the appropriate court of appeals before filing a second or successive motion. *See* 28 U.S.C. § 2255, paragraph 8.

Finally, the title of the rule has been changed to reflect the fact that the revised version addresses only the topic of successive motions.

Rule 10. Powers of Magistrates	Rule 10. Powers of a Magistrate Judge
The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.	If authorized to do so under 28 U.S.C. § 636, a magistrate judge may perform the duties of a district judge under these rules.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 11. Time for Appeal	Rule 11. Time to Appeal
The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.	Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability	Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure
If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.	The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with these rules, may be applied to motions filed under these rules.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

APPENDIX C

[Copies of Habeas Forms]

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3 Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions briefly. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District
Name (under which you were convicted):	Case No.:
Place of Confinement:	Prisoner No :
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)
	V.
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

_____

_____

(b) Criminal docket number (if you know): _____

2. Date of the judgment of conviction: _____
3. Length of sentence: _____
4. Nature of crime (all counts): _____

_____

_____

_____

_____

_____

5. (a) What was your plea? (Check one)

(1) Not guilty ❑ (3) Nolo contendere (no contest) ❑

(2) Guilty ❑ (4) Insanity plea ❑

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

_____

6. Kind of trial: (Check one)

   Jury ❑ Judge only ❑

7. Did you testify at the trial?

   Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

   Yes ❑ No ❑

9. If you did appeal, answer the following:

   (a) Name of court: _____

   (b) Docket number (if you know): _____

   (c) Result: _____

   (d) Date of result (if you know): _____

   (e) Citation to the case (if you know): _____

   (f) Grounds raised: _____

   (g) Did you seek further review by a higher state court? Yes ❑ No ❑

   If yes, answer the following:

   (1) Name of court: _____

   (2) Docket number (if you know): _____

   (3) Result: _____

   (4) Date of result (if you know): _____

   (5) Citation to the case (if you know): _____

   (6) Grounds raised: _____

   (h) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If yes, answer the following:

(1) Docket number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket number (if you know): _____

(3) Nature of the proceeding: _____

(4) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(5) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(6) Result: _____

(7) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket number (if you know): _____

(3) Nature of the proceeding: _____

(4) Grounds raised: _____

(5) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(6) Result: _____

(7) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket number (if you know): _____

(3) Nature of the proceeding: _____

(4) Grounds raised: _____

(5) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(6) Result: _____

(7) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction the action taken on your petition, application, or motion?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(3) Third petition: Yes ❑ No ❑

(e) If you did not appeal to the highest state court having jurisdiction, explain briefly why you did not: _____

12. For this petition, state briefly every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. Summarize briefly the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief. Each one is a separate ground for possible relief. You may raise other grounds besides those listed. However, you should raise in this petition all available grounds (relating to this conviction or sentence) on which you base your claim that you are being held in custody unlawfully.

- Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- Conviction obtained by use of coerced confession.
- Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- Conviction obtained by a violation of the privilege against self-incrimination.
- Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- Conviction obtained by a violation of the protection against double jeopardy.
- Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled
- Denial of effective assistance of counsel.
- Denial of right of appeal.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must set out in the space provided below the facts that support your claims.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.): _____

_____

_____

(b) If you did not exhaust your state remedies on Ground One, briefly explain why: _____

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," briefly explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One.

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Two, briefly explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial

court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(5) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," briefly explain why you did not raise this issue: _____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.): _____

(b) If you did not exhaust your state remedies on Ground Three, briefly explain why. _____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(5) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," briefly explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, briefly explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state the type of motion or petition, the name and location of the

court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(5) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," briefly explain why you did not raise this issue: _____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

_____

_____

_____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ❑ No ❑

If your answer is "No," state which grounds have not been so presented and briefly give your reason(s) for not presenting them: _____

_____

_____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which

ground or grounds have not been presented, and briefly state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ❑ No ❑

If "Yes," state the name and location of the court, the case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinions or orders, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

17. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ❑ No ❑

18. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

_____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

19. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as codified in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2244(d) provides in part that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____

_____ (month, date, year)

Executed (signed) on _____ (date).

_____

Signature of Petitioner (required)

IN FORMA PAUPERIS DECLARATION

28 U.S.C. § 2254

IN FORMA PAUPERIS DECLARATION

_____

[Insert appropriate court]

DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

_____
(Petitioner)

v.

_____
(Respondent(s))

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   _____

   _____

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ☐ No ☐

   b. Rent payments, interest or dividends? Yes ☐ No ☐

   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐

   d. Gifts or inheritances? Yes ☐ No ☐

   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

   _____

   _____

   _____

   _____

3. Do you own cash, or do you have money in a checking or savings account?

Yes ☐ No ☐ (include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned. _____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ☐ No ☐

If the answer is "yes," describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

_____

_____

_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution: _____

_____

_____

_____

_____

Authorized Officer of Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.

2. You must file the form in the United States district court that entered the judgment that you are challenging If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions briefly. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.

7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address.

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name:	Case No.:
Place of Confinement:	Prisoner No.:
UNITED STATES OF AMERICA v.	Movant (include name under which convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket number (if you know): _____
2. Date of the judgment of conviction: _____
3. Length of sentence: _____
4. Nature of crime (all counts): _____

   _____

   _____

   _____

   _____

   _____
5. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (3) Nolo contendere (no contest) ❑

   (2) Guilty ❑

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

   _____

   _____

   _____

   _____

   _____

6. Kind of trial: (Check one)

   Jury ❑ Judge only ❑

7. Did you testify at the trial?

   Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

   Yes ❑ No ❑

9. If you did appeal, answer the following:

   (a) Name of court: _____

   (b) Docket number (if you know): _____

   (c) Result: _____

   (d) Date of result (if you know): _____

   (e) Citation to the case (if you know): _____

   (f) Grounds raised: _____

   _____

   _____

   _____

   _____

   _____

   _____

   (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

   If "Yes," answer the following:

   (1) Docket number (if you know): _____

   (2) Result: _____

   _____

   (3) Date of result (if you know): _____

   (4) Citation to the case (if you know): _____

   (5) Grounds raised: _____

   _____

   _____

   _____

   _____

   _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

    Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

    (a) (1) Name of court: _____

(2) Docket number (if you know): _____

(3) Nature of the proceeding: _____

(4) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(5) Did you receive a hearing where evidence was given on your motion, petition, application?

Yes ❑ No ❑

(6) Result: _____

(7) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket number (if you know): _____

(3) Nature of the proceeding: _____

(4) Grounds raised: _____

_____

_____

_____

_____

_____

(5) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ❑ No ❑

(6) Result: _____

(7) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

_____

_____

12. For this motion, state briefly every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. Summarize briefly the facts supporting each ground.

CAUTION: If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date

For your information, the following is a list of the most frequently raised grounds for relief. Each one is a separate ground for possible relief. You may raise other grounds besides those listed. However, you should raise in this motion all available grounds (relating to this conviction or sentence) on which you base your claim that you are being held in custody unlawfully.

- Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- Conviction obtained by use of coerced confession.
- Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- Conviction obtained by a violation of the privilege against self-incrimination.
- Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- Conviction obtained by a violation of the protection against double jeopardy.
- Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- Denial of effective assistance of counsel.
- Denial of right of appeal.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must set out in the space provided below the facts that support your claims.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.). _____

_____

_____

_____

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state the type of motion, petition, or application, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," briefly explain:

GROUND TWO: _____

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.): _____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state the type of motion, petition, or application, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," briefly explain: _____

_____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim): _____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did <u>not</u> raise this issue in your direct appeal, briefly explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state the type of motion, petition, or application, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," briefly explain: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just briefly state the facts that support your claim.): _____

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, briefly explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state the type of motion, petition, or application, the name and location of the court where the motion or petition was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state the name and location of the court where the appeal was filed, the case number (if you know), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," briefly explain:

13. Is there any ground in this motion that has not been presented in some federal court? If so, which ground or grounds have not been presented, and briefly state your reasons for not presenting them: _____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the case number, the type of proceeding, and the issues raised. _____

15 Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding. _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ❑ No ❑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

_____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as codified in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ _____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Movant (required)

IN FORMA PAUPERIS DECLARATION

28 U.S.C. § 2255

IN FORMA PAUPERIS DECLARATION

_____

[Insert appropriate court]

United States
v.
_____
(Movant)

DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, _____, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
   _____
   _____
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
   _____
   _____
2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ☐ No ☐
   b. Rent payments, interest or dividends? Yes ☐ No ☐
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐
   d. Gifts or inheritances? Yes ☐ No ☐
   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____
   _____
   _____
   _____
   _____
3. Do you own any cash, or do you have money in a checking or savings account?

   Yes ☐ No ☐ (Include any funds in prison accounts)

   If the answer is "yes," state the total value of the items owned. _____
   _____
   _____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ☐ No ☐

If the answer is "yes," describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

_____

_____

_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of $_____ on account to his credit at the _____ institution where he is confined.

I further certify that movant likewise has the following securities to his credit according to the records of said _____ institution: ____

_____

_____

_____

_____

_____

Authorized Officer of Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

APPENDIX D

[Copy of Minutes of April 2002 Meeting]

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2002
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 25 and 26, 2002. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, April 25, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. John P. Elwood, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Hon. Roger Pauley of the Board of Immigration Appeals; Prof. Kate Stith, former member of the Committee; Mr. Peter McCabe, Ms. Nancy Miller, and Mr. James Ishida of the Administrative Office of the United States Courts, Mr. John Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Joseph Spaniol, consultant to the Standing Committee; Ms. Laural Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

Judge Carnes, the Chair, welcomed the attendees and noted the presence of new members of the Committee, Judge Bartle and Professor King. He also recognized the contributions and dedicated service of the outgoing members of the Committee, Judge Davis and Professor Stith. He also recognized the long years of service of Hon. Roger Pauley, who had represented the Department of Justice at the Committee meetings for many years, before accepting an appointment to the Board of Immigration Appeals.

II. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in San Diego, California in October 2000 be approved. The motion was seconded by Judge Bucklew and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE SUPREME COURT

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 26, 30, and 35; and the more recent proposed amendments to Rules 6 and 41, were pending before the Supreme Court.

IV. RULES PUBLISHED FOR PUBLIC COMMENT: RULE 35.

The Reporter informed the Committee that seven written comments had been received on the proposed amendment to Rule 35. He briefly reviewed the history of the pending amendment to the effect that although the restyled Rule 35 was in the process of being approved by the Supreme Court, the Advisory Committee believed it important to move forward with another amendment to Rule 35 that would more clearly spell out the starting point for the 7-day period for correcting a clear error in the sentence. Thus, the proposed new Rule 35(a) includes a definition of "sentencing" — only for purposes of Rule 35. He continued by reporting that the written comment were mixed. The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The Reporter further noted that the public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, leaving open the possibility of the court changing the sentence, and adopting the minority, rather than majority view of the circuit courts that have addressed the issue. At least one commentator noted that the rule as proposed creates a special definition for "sentencing" that normally does not apply to other rules, such as Rule 32 itself. He also reported that those commentators endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

The Reporter pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

Mr. Campbell indicated that he favored a change to the proposed amendment that would substitute the words "entry of judgment" in place "sentencing" throughout the rule. That option, he stated, would avoid the necessity of a separate definitional provision in the Rule. Mr. Elwood stated that the Department of Justice was opposed to the proposed amendment because it interjects yet another delay in the finality of the sentence for purposes of triggering the Rule 35 provisions. He noted that he favored substituting the words "oral announcement" or "oral pronouncement" of the sentence as the preferred language in place of entry of the judgment, which might not actually take place until weeks or perhaps months after the court announces the sentence.

Judges Bucklew and Roll, and Mr. Goldberg indicated that in their experience the entry of judgment generally follows the oral announcement of sentence within a short period of time.

Following additional discussion on whether to use the term "oral announcement" or "oral pronouncement," Mr. Campbell moved that the proposed amendment be changed to the effect that the proposed definitional provision in Rule 35(a) be dropped and that the term "entry of judgment" be used throughout the rule. Mr. Goldberg seconded the motion, which failed by a vote of 4 to 6.

Judge Roll moved that the amendment be revised by dropping the definitional provision in proposed Rule 35(a), and the term "oral announcement" be used throughout the rule and that the rule be forwarded to the Standing Committee for action. Judge Bucklew seconded the motion. Following additional brief discussion, the Committee approved the motion by a vote of 6 to 4. The Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration. (The Committee later decided to defer transmission of the proposed amendments to Rule 35 for further study and drafting.)

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 41. Tracking-Device Warrants

Judge Miller, as chair of the Rule 41 Subcommittee, reported that the Subcommittee had agreed on a number of proposed changes to Rule 41 that would

address first, the issue of tracking-device warrants and second, delayed notification that a search warrant has been executed.

He provided a brief overview of the proposed changes, noting that the Department of Justice had raised the issue of tracking-device warrants in 1998 and that as a result of that proposal, he had polled magistrate judges on how they were handling those types of searches, in the absence of any guidance in Rule 41 itself. The response indicated that the practice varied throughout the districts. Any proposals to address the issue, however, were held pending the restyling project. He further noted that the issue of delayed notification that warrants had been executed had been addressed in Section 213 of the USA PATRIOT Act and that some amendment to Rule 41 would be appropriate.

Judge Miller reported that the Rule 41 Subcommittee had considered a number of issues in relation to the USA PATRIOT Act. First, it had considered whether Section 209 of the Act, which addresses the ability of the government to access unopened voicemail messages, should be addressed in Rule 41. He reported that the Subcommittee recommended that the topic not be included. Second, the Subcommittee had decided not to address Section 216 of the Act, which concerns government's ability to capture certain addressing information from electronic facilities. He noted that such orders were not search warrants covered by Rule 41. And third, the Subcommittee decided not to address Section 220 of the Act, which addresses nationwide service of search warrants for electronic evidence. He noted that the section has a sunset provision of December 31, 2005.

The Committee concurred in the Subcommittee's recommendations not to amend Rule 41 to account for those three new statutory provisions.

Judge Miller also reported that Judge D. Brock Hornby (Chief Judge, D. Maine) had recommended that Rule 41 be amended to permit law enforcement officers to return executed search warrants to the clerk of the court, and not necessarily the issuing judge or magistrate. Judge Miller noted that the issue had been addressed during the restyling project and that the Committee had determined that it was preferable to have the returns made to the magistrate judge designated in the warrant. He also noted that the sense of the Subcommittee was that it would be better to maintain judicial monitoring of the warrants and that requiring the warrant to be returned to a judicial officer would further that interest. Judge Bartle spoke in favor of the proposed change, noting that in practice, warrants are returned to the clerk of the court and not to the issuing magistrate. Following additional discussion by the Committee, it voted 8 to 1 to reject the proposal to amend Rule 41 by requiring the return to be made to the clerk.

Turning to the Subcommittee's proposed amendments to Rule 41, Judge Miller noted that the Subcommittee had proposed that two new definitions for "domestic terrorism," "international terrorism," and "tracking device" be added to Rule 41(a)(2). He also pointed out the proposed language in revised Rule 41(b)(4) that would explicitly address the authority of a magistrate judge to issue a tracking device warrant. He noted

that the proposed amendment would authorize only magistrate judges, and not state judicial authorities, to issue tracking-device warrants. He noted that the Subcommittee believed that because such warrants often include monitoring across state and district lines, it would be preferable to vest that authority in federal judicial officers. Following additional brief discussion, the Committee voted 8 to 0 to adopt the proposed changes.

Professor Stith raised the question whether amendments to Rule 41 concerning tracking-device warrants might supersede other types of searches. The Committee generally agreed that amending Rule 41 would not preclude the development or recognition of others types of searches, not otherwise addressed in Rule 41. Several members noted that the traditional caselaw view is that Rule 41 is not intended to provide an exhaustive list of permissible search warrants.

Judge Miller noted that Subcommittee had decided to amend Rule 41(e)(2) into two main subdivisions, (e)(2)(A), which deals with contents of regular search warrants, and (e)(2)(B), which addresses the contents of tracking-device warrants. The Subcommittee used similar parallel construction in Rule 41(f), concerning executing and returning the warrant. Judge Miller informed the Committee that the Subcommittee had considered several possible alternatives for specifying the length of time a tracking-device warrant might be used and that it had settled on 45 days. Mr. Elwood responded that the Department of Justice would favor using time limits similar to those used in Title III wiretaps. Mr. Fiske agreed with that view. Other members, however, expressed reservations about including the Title III deadlines in Rule 41 and noted that the 45-day limit should normally provide ample time for authorities to install and monitor tracking devices. In addition, the proposed rule permitted officers to seek additional time periods. The Committee rejected the proposal to adopt the Title III time limits, instead of the Subcommittee's 45-day provision, by a vote of 2 to 7.

Discussion on the time limits continued with focus on the 10-day period for installing tracking devices in Rule 41(e)(2)(B)(i). Following additional discussion, the Committee voted 11-0 to amend the proposed rule to provide for 10 calendar days for installation, which would provide ample time for installation.

Several members raised the question whether in light of the time requirements, AO Form 93 was still correct. Mr. MaCabe indicated that those forms are the responsibility of the Director of the Administrative Office and they could be conformed to meet the Rule's requirements.

Judge Miller continued by pointing out that the Subcommittee had suggested a major revision of Rule 41(f) to accommodate the differences in regular warrants and warrants for tracking devices. Following discussion, the Committee agreed to provide in Rule 41(e)(2)(A) that the officer executing the warrant should be required to note on tracking-device warrants the date the device was installed, and the periods during which the device was used. The Committee also agreed to the Subcommittee's proposed

amendments for serving a tracking device warrant on the person who was tracked or whose property was tracked.

Finally, Judge Miller pointed out that the Subcommittee had recommended that Rule 41(f)(3) be added to the rule. That provision, which is co-extensive with Section 213 of the USA PATRIOT Act, permits a judge (including a state judicial officer) to grant a delay for any provision in Rule 41. The Committee discussed the question of whether that provision would extend only to the "sneak and peek" searches. There was general agreement that it was not so limited.

In that regard, Mr. Pauley urged the Committee to reconsider its decision not include amendments to Rule 41 that would provide explicitly for covert, or sneak and peek, searches. He pointed out that there was caselaw supporting such searches. Judge Miller responded that following the comment period for a proposed amendment in 2001 that would have addressed such searches, the Subcommittee had decided not to address that topic, given the great difficulty in addressing the variety of questions and objections to any attempt to include coverage of those searches in Rule 41. The Subcommittee had decided to recommend that the issue be left with any developing caselaw.

Following additional discussion on proposed changes to the proposed Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment. Judge Bucklew seconded the motion, which carried by a vote of 12-0.

B. Rules Governing § 2254 and § 2255 Proceedings

1. Consideration of Substantive Issues

Judge Trager, chair of the Habeas Rules Subcommittee, reported that the Subcommittee had considered style and substantive amendments to the Rules Governing § 2254 and § 2255 Proceedings. He began the discussion by noting that the Subcommittee had considered several substantive issues that might change current practice. First, he noted that the Subcommittee had addressed the issue of handling defective petitions or motions. He pointed out that before the Antiterrorism and Effective Death Penalty Act of 1996, defective petitions and motions were rejected and returned to the petitioner or moving party. That Act, however, created a one-year statute of limitations and thus if a court rejects a petition or motion because it does not conform to the rules, may penalize the person. Thus, the Subcommittee proposed eliminating Rule 2(e) of the § 2254 rules and Rule 2(d) of the § 2255 rules, and including a new provision in Rule 3 of each of those rules that would parallel Rule 5 of the Federal Rules of Civil Procedure and require the clerk to file such papers, even if they were in some way defective. If the papers are defective, the Subcommittee envisioned that the court would direct the petitioner or moving party to correct the deficiencies.

The Committee agreed with the Subcommittee's recommendations concerning Rule 2.

Second, Judge Trager stated that the Subcommittee had discussed whether Rule 9(a) of both the § 2254 and § 2255 rules was still necessary; that rule, he explained, addressed the issue of delayed petitions and motions. He noted that it was the view of some members that that rule no longer has any viability in light of the one-year statute of limitations. Judge Miller stated that the original position of the Subcommittee (in 1998) that the provisions might still have some utility for any petitions still pending in the state court systems. Following additional discussion, Judge Bartle moved that Rule 9(a) be deleted. Judge Miller seconded the motion, which carried by a vote of 10-0, with one abstention.

Third, Judge Trager noted that the Subcommittee had discussed whether Rule 5 of the rules should include a specific reference for replies from the petitioner or moving party to the government's response. He noted that in some districts, the court permits the petitioner or moving party to file a reply, particularly in those cases where they may have a response to the government's claim that a statute of limitations or exhaustion of remedies claim bars the petition or motion. To address that issue, he noted that the Subcommittee had proposed the addition of new Rule 5(e). Judge Bucklew observed that this would certainly be a substantive change to the rules, but noted that the petitioner and moving party should be provided with that opportunity. Following additional discussion, Judge Trager moved that new Rule 5(e), which addressed replies from petitioners and moving parties, be added to Rule 5. Judge Bartle seconded the motion, which carried by a vote of 12-0.

Fourth, Judge Trager informed the Committee that the Subcommittee had discussed the issue of what information, regarding exhaustion of remedies, etc., should be required on the habeas forms and what information should be explicitly required by the rules themselves. Judge Trager moved that the requested information should be placed on the forms, and not in the rules. Judge Miller seconded the motion, which carried by a vote of 11-0.

Fifth, Judge Trager noted that the Subcommittee had considered whether to reference specifically § 2241 petitions in the rules and that it had decided not to do so.

Finally, he informed the Committee that the Subcommittee had considered whether to attempt to blend the two sets of rules into one combined set of rules. Judge Miller had attempted to do so and concluded that doing so would not be feasible, given the differences in the rules and key terminology.

The Committee generally concurred in those proposals.

2. Consideration of Proposed Style Changes to Rules

Judge Trager informed the Committee that Professor Kimble and Mr. Spaniol had prepared the initial "style" draft of the rules, which had in turn had been assigned to individual members of the Subcommittee. The Committee considered each rule for § 2254 and § 2255 Proceedings in tandem. (The titles of the Rules in these minutes are as they appear currently.)

Rule 1. Scope of Rules. Judge Miller informed the Committee that the Subcommittee had made several style changes to Rule 1 for both sets of Rules. The Committee approved the changes.

Rule 2. Petition (Motion). Judge Miller pointed out the style changes to Rule 2 for both sets of Rules. As previously discussed, the Committee deleted Rule 2(e) in the § 2254 Rules and Rule 2(d) in the § 2255 Rules, dealing with the court's return of an insufficient petition or motion. The Committee also deleted the language in current Rule 2(c), which requires the petitioner or moving party to specify all grounds for possible relief, including those that should have been known or reasonably known by the petitioner or moving party; members of the Committee believed that this language was probably unnecessary in light of the AEDPA. The Committee also modified the language in the rule that currently requires that the papers be signed personally by the petitioner or moving party under penalty of perjury; the Committee recognized that § 2242 permits someone representing the petitioner or moving party to sign the document. Following discussion, the Committee approved the proposed changes by a vote of 12-0.

Rule 3. Filing Petition. Judge Miller pointed out that the Subcommittee had proposed that the Committee include a new provision in Rule 3(b) that would require the clerk to accept an otherwise insufficient petition or motion and that it use language similar to that found in Federal Rule of Civil Procedure 5. He also pointed out that the Subcommittee had recommended adding a new Rule 3(c), that would call attention to the one-year statute of limitations; in the § 2254 Rules the cite is to § 2244(d) and in the § 2255 Rules the reference is to § 2255, para. 6. The Committee also discussed a new provision, Rule 3(d) that spells out when a paper filed by an inmate, using an institution's internal mailing system, is considered to have been filed. Following additional discussion on the proposed changes to Rule 3, the Committee approved them.

Rule 4. Preliminary Consideration by Judge. Professor King explained the Subcommittee's proposed changes to Rule 4. During the discussion, the Committee agreed to change the Rule to require that the court "serve" the petition or motion on the appropriate parties in § 2254 proceedings, rather than requiring in all cases that certified mail be used to accomplish the delivery of those documents. Judge Bartle also pointed out that the rule currently requires that the petition in § 2254 proceedings be served on the Attorney General of the State, when the actual practice in some states might be to serve some other official. The Committee changed the proposed amendment to permit service on the Attorney General, or another appropriate state officer. The Committee

discussed whether to retain word "promptly" and ultimately decided to leave it in the Rule.

Rule 5. Answer; Contents. Professor King pointed out the Subcommittee's proposed style amendments to Rule 5. The Committee approved changes to Rule 5 for § 2254 proceedings that would require the respondent to supply the court with copies of any briefs it had submitted to an appellate court, and any opinions and dispositive orders from that appellate court.

Rule 6. Discovery. Professor King explained the minor style changes proposed by the Subcommittee; the Committee approved the changes.

Rule 7. Expansion of Record. Mr. Elwood pointed out the Subcommittee's minor style changes to the rule, which included moving the text of Rule 7(d) to revised Rule 7(a). The Committee approved the changes.

Rule 8. Evidentiary Hearing. Mr. Elwood explained the Subcommittee's proposed style changes to Rule 8, including substitution of the word "serve" in place of "certified mail."

Rule 9. Delayed or Successive Petitions (Motions). Mr. Campbell explained the proposed style changes to Rule 9. In particular he pointed out that the proposed revised rule specifically referenced the need to obtain approval from the appropriate court of appeals, a requirement imposed by the AEDPA. Judges Carnes and Trager raised the question about including a provision in Rule 9 to address the situation where a court recharacterizes a post-trial filing as a § 2255 motion, with or without notice to the moving party. Judge Carnes noted that several cases require the court to first notify the moving party that such recharacterization may prevent further filings which would become successive motions. Professor King suggested that if an amendment was in order, perhaps it should go in Rule 1. Several members raised the question about the content of such warnings or advice; eventually a consensus emerged that the issue should be left, for now, to further caselaw developments. Mr. Campbell raised the question whether the rule should address the situation where only a portion of the petition or motion could be dismissed on grounds that the petitioner or moving party had not exhausted all claims. The Committee decided not to include language about that issue.

Rule 10. Powers of Magistrate. Mr. Campbell noted the minor style suggestions to Rule 11, which were approved by the Committee.

Rule 11, § 2254 Proceedings. Applicability of Rules of Civil Procedure. The Committee approved the minor style changes to Rule 11, for § 2254 Proceedings.

Rule 11, § 2255 Proceedings. Time for Appeal. The Committee approved the minor style suggestions proposed by the Subcommittee.

Rule 12, § 2255 Proceedings. Applicability of Rules of Civil Procedure and Rules of Criminal Procedure. The Committee approved the minor style changes to Rule 11 of the § 2255 Rules.

Judge Carnes indicated that the Rules and accompanying forms would be presented to the Standing Committee with a view toward requesting that they be published for comment.

C. Other Proposed Amendments to Rules

1. Rule 12.2. Notice of Insanity Defense; Mental Examination

Judge Carnes stated that Mr. Pauley had written to the Committee suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. Following additional brief discussion, Judge Carnes indicated that the matter would be placed on the agenda for the Committee's Fall 2002 meeting and he asked the Reporter to draft appropriate language for a possible amendment to Rule 12.2.

2. Rule 16; Discovery and Inspection

The Reporter indicated that Mr. Carl Peterson, an attorney practicing in New York City, had suggested an amendment to Rule 16 that would require the government to disclose automatically the identity of any government expert, in the same manner as that provided for in the Civil Rules. The Committee briefly discussed the proposal and decided to take no further action.

3. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Judge Friedman discussed his proposed amendments to Rules 29, 33, and 34 concerning the 7-day time limit for filing motions filed under those rules, or obtaining from the court, within that same 7-day limit, a fixed deadline for filing a motion under those rules. He explained that the case might arise where the defendant files an extension of time within the 7 days but due to the judge's illness or absence, the judge does not, within the 7-day limit, extend the deadline. He noted that at least one Circuit had ruled that the 7-day limit is jurisdictional and that in those cases, through no fault of the defendant, the defendant is not permitted to file a late motion.

Mr. Elwood stated that he believed that that would be the exceptional case and Judge Trager observed that if the defendant was barred from filing a motion under one those three rules, the defendant could still file a § 2255 motion and seek relief. Judge Bartle noted that in those cases there is no real prejudice because the defendant can raise

the issue on appeal. And the Reporter observed that amending the Rules to address that situation might simply create another set of problems. Following additional discussion, Judge Friedman moved that Rules 29, 33, and 34 be amended to remove the requirement that the judge rule on a request for an extension of time within the 7-day time limit. Mr. Fiske seconded the motion, which carried by a vote of 10-2. Judge Carnes stated that the matter would be placed on the Committee's Fall 2002 meeting for a decision about the language to be used.

4. Rule 32. Sentencing; Issue of Finality.

The Reporter stated that Judge D. Brock Hornby had proposed an amendment to Rule 32 that would address the question of when a sentence is final where the court imposes forfeiture as part of the sentence but the actual amount is not set until later. Several members noted that the issue was probably addressed in 18 U.S.C. § 3664(d)(5). Judge Friedman suggested that amending Rule 32 might create a new set of problems; other members noted the interlocking issues of utilizing the statute, Rule 32 as written, and notices of appeal. Other members observed that they did not believe that there was uncertainty in the existing procedural rules. Following additional discussion, the Committee agreed to take no further action on the proposal.

5. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Judge Carnes noted that he had provided the Committee with a copy of *United States v. Frazier*, ____ F.3d _____ (11th Cir. 2002), where the court noted that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. Following additional discussion, Judge Bartle moved that Rule 32.1 be amended to include a right to allocution. Judge Roll seconded the motion, which carried by a vote of 12-0. Judge Carnes indicated that the language effecting the amendment would be on the agenda for the Committee's Fall 2002 meeting.

6. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

Judge Tashima discussed his proposal that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). That rule addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive, pretrial matters. He noted that issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), in which the court noted the absence of such a rule and concluded that in criminal cases, unlike civil cases, a defendant is not required to appeal a magistrate judge's decision to the district judge in order to preserve the matter for appeal.

Judge Miller reported that he had polled fellow magistrate judges and that there was no record of this ever being an issue. He supported a possible amendment, however. Following additional discussion, Judge Miller moved that the Committee consider an amendment to the Rules; Judge Roll seconded the motion, which carried by a vote of 11 to 1. Judge Carnes indicated that the matter of the language to be used for the amendment would be placed on the agenda for the Fall 2002 meeting.

7. Miscellaneous Proposed Amendments to Rules

Judge Carnes pointed out that Mr. Pauley had written an extensive memo to the Committee setting out a variety of proposals. He indicated that although some of the issues had already been discussed, the Committee might wish to consider others.

The Reporter briefly discussed each of the proposals, or categories of proposals. First, Mr. Pauley had identified several rules that may need to be amended to address international criminal activity — Rules 4, 5, 6, and 41. The Reporter observed that the Committee had actually accomplished some of those points, especially with recent amendments to Rules 6 and 41.

Second, the Reporter pointed out that Mr. Pauley had noted that the development of DNA evidence may support another global review of the rules. For example, he raised a number of questions about whether the current rules would permit an indictment of a yet unknown defendant who can be identified only by DNA evidence, in order to toll the statute of limitations. Another example is the possible relationship between Rule 33 (New Trial) and the Innocence Protection Act.

Third, Mr. Pauley had identified lingering issues that the Committee may wish to consider, i.e., the issue of intra-Departmental access to grand jury information for purposes of civil enforcement in Rule 6 and addressing the issue of equalizing the number of peremptory challenges in Rule 24.

Fourth, the Reporter noted that Mr. Pauley had suggested that the Committee reconsider the issue of whether the court in conducting a plea colloquy under Rule 11 should be required to apprise the defendant, who is an alien, about possible adverse immigration consequences following a guilty or nolo contendere plea.

Fifth, Mr. Pauley had offered additional views in support of adopting language (or a new rule) on the subject of covert searches and suggests that the Committee may wish to visit the issue of authorizing judges to issue warrants for persons or property "within or outside" the district. The Reporter indicated that the Committee had already addressed that point, at least with regard to terrorist activities and with regard to tracking-device warrants.

Finally, Mr. Pauley had offered a list of miscellaneous matters that may deserve attention; whether to adopt a new general rule regarding waiver vis-a-vis consent;

clarifying language in Rule 1 concerning the ability of a "judge" to act; and in Rule 16, extending the due diligence requirement to the subsection dealing with disclosure of documents and tangible evidence. Judge Carnes observed that some of those issues had been debated at length in the past, in particular the definition of "judge" in the Rules.

Following brief discussion on these items, Judge Carnes asked for and received a consensus that the proposals be tabled and that if any member wished to formally propose any particular amendment, after further considering any of Mr. Pauley's proposals, to contact him or the Reporter so that the proposal could be placed on the agenda for the Fall 2002 meeting.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

Judge Carnes informed the Committee that it had been requested to review model local rules concerning electronic filings in criminal cases. He indicated that last year, a subcommittee of the Committee on Court Administration and Management (CACM) developed a model local rule for accepting electronic filings in civil cases. The Judicial Conference ultimately approved that rule. Now, he said, it appeared that some courts will be able to accept electronic filings in criminal cases in the very near future and that the subcommittee chair of CACM on electronic filing, Judge John Koeltl (S.D.N.Y) has offered suggested changes to the existing model local rules to accommodate criminal cases. The revised rules had been forwarded also to Judge Fitzwater, chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure, who in turn has asked the members of that subcommittee to review the attached draft and offer any comments or suggestions to the Criminal Rules Committee.

Judge Carnes added that in the anticipation that a model local rule will be submitted, eventually, to the Judicial Conference, the Committee should review the enclosed draft and offer its views, suggestions, or comments on the proposed rule. He called on Ms. Nancy Miller, of the Administrative Office, who had been working on the issue, to provide additional background information about the proposed model rules.

The Committee held an extended discussion on what, if any, special problems might arise with electronic filings in criminal cases. Several members were of the view that anything signed by the defendant should be filed in its original form and not electronically. Others noted that a scanned document, electronically transmitted might meet that requirement. Ms. Laural Hooper informed the Committee that some counsel are using that method to transmit documents to the courts involved in the pilot programs. That in turn lead to a discussion about what documents should be original or scanned, when they are filed.

There was also discussion about the ability of the parties themselves and the public to gain access to criminal court records. Ms. Miller pointed out that the current system was to permit counsel to obtain access, including counsel for co-defendants. The courts were maintaining a private docket and a public docket; thus, although the public could obtain access electronically to certain filings, others were placed on the private docket of filings and were not generally available to the public.

Mr. Rabiej pointed out that the proposed local rules were designed to provide only preliminary guidance to the courts that wished to experiment with electronic filings in criminal cases. After they have used the system, he anticipated that further changes would be made to the model local rules.

Judge Trager observed that the Committee should not place too rigid limits on the ability of the courts to experiment with electronic filing. Following further discussion, Judge Friedman moved that the Committee recommend that all charging documents be filed in their original form or in a scanned format, at the court's discretion, and that everything signed by the defendant could be filed in the original or in scanned format, at the discretion of the court. Judge Miller seconded the motion, which carried by a vote of 10-2.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting on September 26 to 27, 2002 in Maine, depending on availability of accommodations.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter, Criminal Rules
Committee

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

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

FROM: **Honorable Milton I. Shadur, Chair**
Advisory Committee on Evidence Rules

DATE: **May 1, 2002**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 19, 2002, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 608(b), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, GAP report, and summary of public comment for the proposed amendment to Rule 608(b).

The Evidence Rules Committee also unanimously agreed to revise a proposed amendment to Evidence Rule 804(b)(3) that was released for public comment. Part II of this Report summarizes the discussion of the proposed amendment as released for public comment and its proposed revision. The Evidence Rules Committee unanimously recommends that the revised proposal to amend Rule 804(b)(3) be released for a new round of public comment.

The Evidence Rules Committee also reviewed some long-term projects that are summarized in Part III of this Report. The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report.

II. Action Items

A. Recommendation To Forward the Proposed Amendment to Evidence Rule 608(b) to the Judicial Conference

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 608(b). The Committee resolved 12 written comments from the public on this proposed amendment. Public hearings were cancelled because nobody expressed an interest in testifying. A complete discussion of the Committee's consideration of the public comments respecting Rule 608(b) can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendment to Rule 608(b).

The proposed amendment to Evidence Rule 608(b) is intended to bring the text of the Rule into line with the original intent of the drafters. The Rule was intended to prohibit the admission of extrinsic evidence when offered to attack or support a witness' character for truthfulness. Unfortunately the text of the Rule is phrased as prohibiting extrinsic evidence when offered to attack or support a witness' "credibility"– a less precise locution. The term "credibility" can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statement. *United States v. Abel,* 469 U.S. 45 (1984) held that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness' character for veracity. But even though most case law is faithful to the drafters' original intent, a number of cases continue to misapply the Rule to preclude extrinsic evidence offered to impeach a witness on grounds other than character. *See, e.g., Becker v. ARCO Chem. Co.,* 207 F.3d 176 (3d Cir. 2000) (stating that evidence offered for contradiction is barred by Rule 608(b)); *United States v. Bussey,* 942 F.2d 1241 (8th Cir. 1991) (stating that the "plain language" of the Rule bars the use of extrinsic evidence to impeach a witness by way of contradiction); *United States v. Graham,* 856 F.2d 756 (6th Cir. 1988) (Rule 608(b) bars extrinsic evidence when offered to prove that the witness is biased).

The proposed amendment substitutes the term "character for truthfulness" for the overbroad term "credibility," thereby limiting the extrinsic evidence ban to cases in which the proponent's sole purpose is to impeach the witness' character for veracity. This change is consistent with the Court's construction of the Rule in *Abel.* The Committee Note to the proposed Rule clarifies that the admissibility of extrinsic evidence offered to impeach a witness on grounds other than character is governed by Rules 402 and Rule 403, not by Rule 608(b).

The public comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be limited to its original intent, which was to exclude extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and to leave all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One public commentator noted that there are other places in the Evidence Rules where the term "credibility" is probably used to mean "character for truthfulness." He suggested that the Committee use the occasion of the proposed amendment to address other provisions in the Evidence Rules where the term "credibility" is arguably misused. The Committee considered this comment carefully. It unanimously determined that the proposed amendment should be revised slightly to replace the term "credibility" with the term "character for truthfulness" in the last sentence of Rule 608(b). The Committee also revised the proposed Committee Note to refer to this slight change in the text and to explain that the change was made to provide uniform terminology throughout Rule 608(b).

The Evidence Rules Committee further considered whether the term "credibility" should be changed in other Evidence Rules. The Committee determined that the term need not be changed in Rule 608(a), because that Rule already limits impeachment to evidence pertinent to a witness' character for truthfulness. The Committee also determined that the use of the term "credibility" in Rules 609 and 610 has not created the same problems for courts and litigants as has the use of that term in Rule 608(b). The Committee found no reason to delay or withdraw the amendment to Rule 608(b) simply because the term "credibility" is used in other Evidence Rules.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 608(b), as modified following publication, be approved and forwarded to the Judicial Conference.

B. Recommendation To Approve the Revised Proposed Amendment to Evidence Rule 804(b)(3) For Release For Public Comment

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 804(b)(3). This amendment would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the hearsay statement. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases. The most important goal of the proposed amendment as released for public comment was to provide equal treatment to the accused and the prosecution in a criminal case.

After reviewing the public comment – particularly the comment filed by the Department of Justice – a majority of the Evidence Rules Committee determined that the proposal released for public comment would create substantial problems of application in criminal cases where declarations against penal interest are offered by the prosecution. This is because most courts have held that "corroborating circumstances" can or must be shown by reference to independent corroborating evidence indicating that the declarant's statement is true. But this definition of corroborating

circumstances – including a component of corroborating evidence – is problematic if applied to government-proffered hearsay statements because of the decision in *Lilly v. Virginia,* 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. And the Court in *Lilly* held that this showing of "particularized guarantees of trustworthiness" cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

Consequently, the proposed amendment's requirement of "symmetry" in applying the corroborating circumstances requirement to statements offered by the prosecution could end up in requiring the government to satisfy an evidentiary standard that is either more stringent than that required by the Constitution or different from that required by the Constitution. The government might have to provide independent corroborating evidence that the declaration against penal interest is true, even though the Confrontation Clause imposes no such requirement. The risk of confusion and undue burden in applying different evidentiary and constitutional standards to the same piece of evidence is profound. For this reason, a majority of the Evidence Rules Committee voted to withdraw the proposed amendment to Rule 804(b)(3) as it was released for public comment.

Despite voting to withdraw the proposed amendment, the Committee determined that the existing Rule presents a number of problems, the most important being that it does not comport with the Constitution in a criminal case. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. To satisfy the Confrontation Clause, the government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Committee found it notable that courts have struggled mightily to read Evidence Rules as if their text were consistent with the Constitution. Courts are understandably uncomfortable with having Evidence Rules that could be unconstitutional as applied. One example is the cases construing Rules 413-415. Courts have gone a long way to read those Rules as incorporating a Rule 403

balancing test, even though that is not evident from the text of those Rules. The rationale for that construction is that otherwise the Rules would violate the due process rights of a defendant charged with a sex crime. Another example of a non-textual construction found necessary due to the constitutional infirmity of the text of the Rule is Rule 804(b)(3) itself. The leading case on the subject, *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978), construed Rule 804(b)(3) as requiring corroborating circumstances for inculpatory statements against penal interest even though the text does not abide that construction. The Court reasoned that unless such a requirement were read into the Rule, the Rule would violate the defendant's right to confrontation. The Committee therefore believes that if courts are going to read language into a Rule to protect its constitutionality, it makes sense to write the Rule in compliance with the Constitution in the first place.

The Committee also determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted" – except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. *See, e.g., United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds; yet there is no harm to the defendant because the Circuit requires corroborating circumstances for inculpatory statements against penal interest).

The Evidence Rules Committee also found it notable that a number of the Federal Rules of Evidence are written with constitutional standards in mind. For example, Rule 412, the rape shield law, provides that evidence of the victim's sexual conduct is admissible if its exclusion "would violate the constitutional rights of the defendant." Rule 803(8)(B) and (C), covering law enforcement reports in criminal cases, contain exclusionary language that is designed to protect the accused's right to confrontation. *See United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (noting the constitutional basis for that exclusionary language). And Rule 201(g) contains a limitation on judicial notice in criminal cases, in specific deference to the defendant's constitutional right to jury trial. So it is hardly unusual, and indeed it is appropriate, for Evidence Rules to be written in light of constitutional standards.

Because of the concerns over the unconstitutionality of the Rule as presently written, the Committee has proposed a revised amendment to Rule 804(b)(3). That proposed amendment would accomplish at least three important objectives:

1. It would retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused. The Evidence Rules Committee remains convinced that the corroborating circumstances requirement is necessary to guard against the risk that criminal defendants and their cohorts will manufacture unreliable hearsay statements.

2. It would extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases. This part of the proposal is unchanged from the proposal as originally released for public comment. The Committee notes that at least two federal circuits currently require corroborating circumstances for declarations against penal interest offered in civil cases, even though the text of the Rule does not impose such a requirement. *See American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999); *McClung v. Wal-Mart Stores, Inc.*, 270 F.3d 1007, 1013-15 (6th Cir. 2001). This part of the proposal would bring the Rule into line with this sensible case law.

3. It would require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness." This language is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. It would guarantee that the Rule would comport with the Constitution in criminal cases, without imposing on the government any evidentiary requirement that it is not already required to bear.

The proposed revised amendment to Rule 804(b)(3) was approved by all members of the Committee, including the Justice Department representative. The proposed revised amendment and accompanying Committee Note are attached to this Report.

The Committee believes that the proposed revision is a substantial change from the proposed amendment that was released for public comment. The proposal released for public comment was intended to provide symmetry and unitary treatment of declarations against penal interest; "corroborating circumstances" would be required for all such statements. Most of the public comment considered the merits of a symmetrical application of the corroborating circumstances requirement in criminal cases. In contrast, the proposed revision would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances" – however that term is interpreted by the courts. Because the revision is a significant change, the Evidence Rules Committee recommends that the revised proposal be released for a new period of public comment.

Recommendation: The Evidence Rules Committee recommends that the revised proposal to amend Evidence Rule 804(b)(3) be approved for release for public comment.

III. Information Items

A. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. It is possible that the end result might be an

FJC publication, not an official Committee document, much like two previous publications on Advisory Committee Notes and case law divergence.

The Subcommittee on Privileges prepared two draft rules for consideration by the Committee at the April meeting. Those drafts set forth: 1) a privilege for confidential communications to physicians and mental health providers; and 2) a privilege for confidential communications to clerics. At the April meeting the Committee provided extensive guidance and commentary on the draft of the physician-mental health provider privilege. The Committee also tentatively determined that any privilege for communications to clerics should be left to common law development. .

The Subcommittee on Privilege continues to conduct research on the privileges and will continue to revise and develop draft rules for further consideration and discussion at the October, 2002 meeting and future meetings of the Evidence Rules Committee.

B. Long-Range Planning

At its April meeting the Committee resolved to continue its practice of monitoring the cases and the legal scholarship for suggestions as to necessary amendments to the Evidence Rules. The Committee remains strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, the Committee recognizes that valid arguments for necessary amendments must be considered.

At the April meeting the Committee considered a number of suggestions for amendments derived from three sources: 1. Legal scholarship suggesting change to one or more Evidence Rules; 2. The Uniform Rules project; and 3. Federal case law indicating either a conflict in the meaning of an Evidence Rule or a divergence between the case law and the text of a Rule.

The Committee voted to **reject** any long-term project to consider amendments to the following Evidence Rules:

Rule 104 (Preliminary Questions of Admissibility)

Rule 401 (Definition of Relevance)

Rule 402 (Admissibility of Relevant Evidence)

Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, etc.)

Rule 404(b) (Admissibility of Other Crimes, Wrongs or Acts)

Rule 405 (Methods of Proving Character)

Rules 413-15 (Admissibility of Uncharged Sexual Misconduct)

Rule 610 (Impeachment for Religious Beliefs)

Rule 611 (Mode and Order of Interrogating Witnesses)

Rule 801(c) (Definition of Hearsay).

The Committee voted to consider tentatively whether the following Rules should be amended:

Rule 106 (To consider whether the rule of completeness should apply to statements that are not in writing, e.g., oral or electronic statements.)

Rule 404(a) (To consider whether character evidence should be admissible in civil cases where the defendant is charged with an act that constitutes a criminal offense.)

Rule 408 (To consider whether compromise evidence should be admissible in related criminal litigation.)

Rule 412 (To consider whether evidence of false and withdrawn claims of rape should be admissible, and to consider a technical amendment to the existing text.)

Rule 606(b) (To consider whether statements by jurors should be admissible when the inquiry is to determine whether the jury made a clerical error in rendering the verdict.)

Rule 607 (To consider whether the Rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information.)

Rule 609 (To consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement.)

Rule 613(b) (To consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment.)

Rule 704(b) (To consider whether the Rule should be amended to exclude only opinions of mental health experts).

Rule 706 (To consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA.)

Rule 801(d)(1)(B) (To consider whether the Rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness.)

Rule 803(3) (To consider whether the Rule should be amended to cover statements of the declarant's state of mind when offered to prove the conduct of someone other than the declarant.)

Rule 803(4) (To consider whether statements made to medical personnel for purposes of litigation should continue to be admissible under the exception.)

Rule 803(5) (To consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event.)

Rule 803(6) (To consider whether the business records exception should be amended to require that statements recorded by a person without knowledge of the event must be shown to be reliable, either due to business duty or some other guaranty of trustworthiness.)

Rule 803(8) (To consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

Rule 803(18) (To consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form.)

A more detailed discussion of the above proposals, and the tentative Committee determinations, can be found in the Minutes, attached to this Report.

IV. Minutes of the April, 2002 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 2002 meeting are attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendment to Evidence Rule 608(b) and Committee Note (recommended for approval and forwarding to the Judicial Conference).

Proposed Revised Amendment to Evidence Rule 804(b)(3) and Committee Note (recommended for approval for release for public comment).

Draft Minutes of the April 2002 meeting of the Evidence Rules Committee

Attachment 1

Proposed Amendment to Rule 608(b)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment and Forward the Proposed Amendment to the Judicial Conference.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of

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* New material is underlined; matter to be omitted is lined through.

crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters ~~which~~ that relate only to ~~credibility~~ character for truthfulness.

* * * * *

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino,* 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is

governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision

(a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

SUMMARY OF PUBLIC COMMENTS

Thomas J. Nolan, Esq. (01-EV-001) states that the proposed amendment to Rule 608(b) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts."

Mikel L. Stout, Esq. (01-EV-002) approves of the proposed amendment.

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003) endorses the proposed change to Rule 608(b).

The Federal Magistrate Judges Association (01-EV-004) supports the proposed amendment and notes that it "is consistent with the drafters' original intent and Supreme Court authority."

Professor Lynn McLain (01-EV-005) supports the proposed amendment on the ground that it "clarifies the rule and removes an arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction . . . ."

Professor John C. O'Brien (01-EV-006) supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term "credibility" to refer to "character for truthfulness" and that this usage "has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b)." He contends that the problem of misuse of the term "credibility" is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term "credibility" with the term "character for truthfulness in Rules 608(a), 609, and 610.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009) recommends the

adoption of the proposed amendment to Rule 608(b), noting that it is "a modest and benign narrowing clarification of the existing rule." The Committee states that "the Advisory Committee is correct in suggesting that the proposed amendment brings the rule's language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases."

The Federal Bar Association, Western Michigan Chapter (01-EV-012) supports the proposed amendment to Rule 608(b).

The State Bar of California's Committee on Federal Courts (01-EV-013) supports the proposed modification of Rule 608(b).

Professor James J. Duane (01-EV-014) recommends that the proposed change to Rule 608(b) should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610." He argues that the change proposed by the Advisory Committee "would result in a situation whether the word 'credibility' would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it."

The Committee on the United States Courts of the State Bar of Michigan (01-EV-016) supports the proposed amendment to Rule 608(b).

The National Association of Criminal Defense Lawyers (01-EV-017) "fully supports the proposed amendment to Evidence

Rule 608(b)." The Association notes that the proposed amendment "only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness."

Attachment 2

Proposed Amendment to Rule 804(b)(3)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment for Release for Public Comment.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the

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* New material is underlined; matter to be omitted is lined through.

statement unless believing it to be true. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * * * *

COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating

circumstances for a declaration against penal interest offered in a civil case).

2) To confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory

statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 19, 2002

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 19, 2002, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Ronald L. Buckwalter
Hon. David C. Norton
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David G. Trager, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James N. Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., Former Committee Member
Christopher F. Jennings, Esq., Law Clerk to Hon. Anthony J. Scirica
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by welcoming Christopher Wray, the new Department of Justice representative on the Committee. Judge Shadur then asked for approval of the minutes of the April 2001 Evidence Rules Committee meeting. The minutes were unanimously approved.

Judge Shadur reported on the January 2002 meeting of the Standing Committee. The Evidence Rules Committee's report to the Standing Committee was brief, consisting of a report on the two pending amendments to the Evidence Rules and an update on the long-term project on privileges. Judge Shadur noted that the most important matters currently before the Standing Committee include potential amendments to Civil Rule 23, consideration of possible Federal Rules on attorney conduct, issues raised by electronic case filing and the problems created by the proliferation of local rules.

Committee Consideration of Proposed Amendments Released For Public Comment

1. Rule 608

The proposed amendment to Evidence Rule 608(b) would clarify the scope of the Rule's prohibition on extrinsic evidence. That prohibition would apply only when the extrinsic evidence is offered to prove the character for truthfulness of a witness. Extrinsic evidence offered for other impeachment purposes – such as for bias, capacity, contradiction or prior inconsistent statement – would be governed by Rules 402 and 403. The original Advisory Committee Note makes clear that Rule 608(b)'s exclusion of extrinsic evidence is applicable only if the opponent's goal is to attack the witness' character for veracity. Other forms of impeachment are not intended to be covered by the absolute exclusion on extrinsic proof in Rule 608(b).

The problem giving rise to the need for amendment is that the text of the Rule by its terms prohibits extrinsic evidence whenever offered to address the witness' "credibility." This could be read to bar extrinsic evidence for bias, competency, contradiction, and prior inconsistent statement impeachment since they too bear upon "credibility."

Most courts do read Rule 608(b) the way it was intended – to apply only where the extrinsic evidence is offered to prove the witness' character for truthfulness. But there are many decisions applying the Rule more broadly to mean what it appears to say – that extrinsic evidence is completely prohibited whenever offered on any aspect of the witness' credibility.

Judge Shadur noted that the comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be restored to its original intent – prohibiting extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and leaving all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One comment suggested, however, that the Committee also use the occasion of the proposed amendment to address other provisions in the Evidence Rules in which the term "credibility" is used when the proper reference is to "character for truthfulness." The comment refers to four additional places in the Evidence Rules in which "credibility" is arguably an overbroad reference to "character for truthfulness." They are:

1. In the final sentence of Rule 608(b), which currently provides:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to *credibility*.

2. In Rule 608(a), which currently provides:

> The *credibility* of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

3. In Rule 609(a) , which provides:

> (a) General rule.—For the purpose of attacking the *credibility* of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

4. In Rule 610, which provides:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' *credibility* is impaired or enhanced.

The Committee first considered whether to propose a change to the last sentence of Rule 608(b) in accordance with the public comment. The sense of the Committee was that such a change was a matter of form and not substance, because the provision is rarely applied, and when it is, the courts have had no problem in limiting its protections to matters that are probative of the witness' character for truthfulness. The Committee noted, however, that while an amendment to the second

sentence of Rule 608(b) would not be warranted on its own, it made sense to make a change together with the parallel change to the first sentence of Rule 608(b). The change to both sentences would provide for consistent use of terminology throughout Rule 608(b). A motion was made and seconded to propose that the term "credibility" be replaced with the term "character for truthfulness" in the last sentence of Rule 608(b). That motion was unanimously approved.

The Committee next considered the proposal in the public comment to amend Rule 608(a) to replace "credibility" with "character for truthfulness." The Committee found this question more complex than the previous proposal to change the last sentence of Rule 608(b). Rule 608(a)(1) already states that evidence offered under the subdivision must be limited to that probative of "character for truthfulness or untruthfulness." Thus, the broader reference to "credibility" in subdivision (a) is already limited by language in the Rule. Accordingly, the reference to "credibility" is doing no harm. Nor has it been subject to any misinterpretation by the bench or bar. Moreover, because the limitation to character impeachment already exists in Rule 608(a), an amendment to the term "credibility" would require a more extensive reworking than simply replacing one term with another. For all these reasons, Committee members expressed the sense that the costs of amending the provision far outweighed the benefits. A motion to retain Rule 608(a) as it currently reads was made, seconded, and unanimously approved.

The Committee then took up the suggestion that Rules 609 and 610 should be amended to substitute "character for truthfulness" for the existing term "credibility." The question for the Committee, at the moment, was not whether amendments to those two Rules would make sense, but whether they were so important that the existing proposal to amend Rule 608(b) should be delayed until corresponding amendments to Rules 609 and 610 could be sent out for public comment.

One member of the Committee was in favor of holding off the amendment to Rule 608(b) until corresponding amendments to Rules 609 and 610 were processed. He suggested that amendments should not be made on a piecemeal basis. But the other members of the Committee disagreed. One member pointed out that the Committee had just decided not to propose an amendment to replace the term "credibility" in Rule 608(a), so the notion of a uniform "credibility" package had already been rejected. Other members noted that the need to amend Rule 609 was not established. Unlike Rule 608(b), Rule 609 has not been misinterpreted by the courts. As to Rule 610, the question of amendment raised public policy questions that do not exist under Rule 608(b). It might be appropriate public policy to prohibit impeachment of witnesses due to their religious conviction even though the impeachment attack was not limited to the witness' character. In other words, simply replacing "credibility" with "character for truthfulness" in Rule 610 may result in bad public policy.

The majority of the Committee ultimately determined that any amendment to Rules 609 or 610 should be considered independently, and on its own merits, rather than as a package with Rule 608(b). Because each Rule presented different questions and different advantages and disadvantages, the majority believed that it made no sense to defer the well-received amendment to Rule 608(b) for a number of years. A motion that the proposed amendment to Rule 608(b) not be deferred was approved, with one dissent.

The existing Rule's requirement of "corroborating circumstances" has never been clearly defined. The term "corroborating circumstances" is not used in any other Evidence Rule, and the Advisory Committee Note makes no attempt to define the term.

Most courts have held that "corroborating circumstances" can be shown by reference to independent corroborating evidence indicating that the declarant's statement is true. But this definition of corroborating circumstances – including a component of corroborating evidence – is problematic if applied to government-proffered hearsay statements because of the Supreme Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. And the Court in *Lilly* held that this showing of "particularized guarantees of trustworthiness" cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

The Committee engaged in a lengthy discussion of the merits of the proposed amendment in light of the objections posed by the Department of Justice and other public commentators. Some Committee members noted that the public comment by and large was in favor of establishing symmetry in Rule 804(b)(3). But after substantial consideration, the Committee resolved that the "symmetry" model was not as simple as it appeared. If "corroborating circumstances" requires or permits a showing of corroborating evidence, then the amendment would impose an evidentiary requirement that is different from, and probably more stringent than, the significant evidentiary requirement of reliability currently imposed by the Confrontation Clause after *Lilly*. Moreover, the true impact of the amendment could not even be assessed as applied to prosecution-generated evidence, given the lack of unanimity about the meaning of "corroborating circumstances." Members stated that it was problematic to propose an amendment without being sure of how it would apply or how it would relate to existing evidentiary and constitutional requirements. This was especially so given the reservations about the amendment expressed by several members of the Standing Committee when the amendment was released for public comment.

Another Committee member expressed the view that symmetry in the Rule was unwarranted because inculpatory statements against penal interest are often made under different circumstances than exculpatory statements. As Congress recognized, exculpatory statements are potentially unreliable because a declarant may simply be trying to get the defendant off from charges by confessing to the crime himself, perhaps secure in the knowledge that he will not himself be convicted because the evidence does not point to him. This member stated that in contrast, statements that inculpate the defendant do not raise the same questions of unreliability, especially after the Supreme Court's decision in *Williamson v. United States* – which provides that statements made in custody are inadmissible to the extent they directly implicate the defendant – and especially in light of the government's obligation to satisfy the reliability requirements of the Confrontation Clause.

On the other hand, several Committee members noted the problem of the current state of Rule 804(b)(3) after *Lilly*. As Rule 804(b)(3) currently reads, a hearsay statement offered by the government could satisfy the Rule and yet would not satisfy the Constitution. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. The government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. This has led at least one court to hold that a disserving statement offered against an accused was properly admitted under Rule 804(b)(3) and yet violated the accused's right to confrontation. *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001).

Committee members noted the anomaly of an Evidence Rule that is unconstitutional as applied. Other Evidence Rules are written to avoid a conflict with constitutional principles. Examples include Rule 412, which contains a provision that prohibits its application when to do so would violate the constitutional rights of the accused; Rule 803(8)(B) and (C), which prohibit the admission of police reports when to do so would violate the accused's right to confrontation; and Rule 201(g), which prohibits conclusive presumptions in criminal cases out of concern for the accused's constitutional right to jury trial. To the Committee's knowledge, no other hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The fact that Rule 804(b)(3) can be unconstitutional if applied literally has led a number of courts to extend the Rule's "corroborating circumstances" requirement to statements offered by the government – even though the Rule does not so provide. The problem with this extension, however, is that the "corroborating circumstances" requirement does not necessarily match the Constitution's requirement of "particularized guarantees of trustworthiness." Under the Confrontation Clause, "particularized guarantees of trustworthiness" must be found in the circumstances under which the statement is made – the existence of independent corroborating evidence is irrelevant. In contrast, most courts have construed "corroborating circumstances" to include the possibility of independent corroborating evidence.

Some Committee members noted another disadvantage of an Evidence Rule that does not comport with the Constitution – it poses a trap for the unwary. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed. this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which generally have been found "firmly rooted" – except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking

that an additional, more specific objection on constitutional grounds would be unnecessary. In doing so, counsel will have inadvertently waived the additional reliability requirements of the Confrontation Clause. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated.

In light of this discussion, a Committee member suggested that the proposed amendment be reformulated to accomplish the following objectives.

1. Retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused.

2. Extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases.

3. Require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness."

Judge Shadur noted that if this proposal were accepted by the Committee, it would have to be submitted for a new round of public comment. The proposed amendment released for public comment was intended to provide symmetry and unitary treatment of declarations against penal interest–"corroborating circumstances" would be required for all such statements. The proposed reformulation would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances," however that term is interpreted by the courts.

The Reporter drafted a reformulated proposed amendment to Rule 804(b)(3) in accordance with the Committee member's suggestion. That draft was reviewed by Professor Kimble, a member of the Standing Committee's Subcommittee on Style. Professor Kimble made several suggestions for stylistic changes to the proposed revised amendment to Rule 804(b)(3). Those stylistic changes were incorporated into the draft. The Reporter then drafted a revised Committee Note to respond to the changes that would be made to the proposed amendment as it was released for public comment. The Committee reviewed the draft Note and made suggestions that were incorporated into the draft.

At the end of the discussion, a motion was made and seconded to recommend that the amendment as originally released for public comment, together with a small stylistic change, be approved. This motion was defeated; two members voted in favor and three against.

Recommendation:

A motion was then made and seconded to propose a revised amendment to be released for public comment, in accordance with the revised draft prepared by the Committee with the assistance

of the Reporter and Professor Kimble, and consistently with the discussion set forth above. This new proposal would read as follows:

> (b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

The motion to propose the revised amendment to Rule 804(b)(3) for release for public comment was approved by all members of the Committee, including the Justice Department representative. The proposed Committee Note was also approved unanimously.

In the course of its discussion on the amendment to Rule 804(b)(3) proposed for public comment, and its reformulation of the proposal, the Evidence Rules Committee considered and rejected a number of other proposals for change suggested in the public comment. Those proposals included:

1. *Deleting the corroborating circumstances requirement.* Some public commentary suggested that the corroborating circumstances requirement should be deleted from the Rule entirely. The Committee unanimously rejected this proposal. Members reasoned that this solution would result in a substantial change to the case law and would be contrary to the legislative history of Rule 804(b)(3), in which Congress expressed strong concern about the reliability of against penal interest statements. The Committee found nothing to indicate that the reliability of against penal interest statements has increased over time in such a way as to justify dispensing with the corroborating circumstances requirement.

2. *Expanding the corroborating circumstances requirement to statements against pecuniary interest.* Two public comments suggested that Rule 804(b)(3)'s corroborating circumstances requirement should be extended to declarations against *pecuniary* interest. The Committee unanimously rejected this suggestion on two grounds. First, the Committee believed that declarations

against pecuniary interest are as a class more reliable than declarations against penal interest. This is because declarations against pecuniary interest are often made by declarants who are reliable and credible, whereas declarations against penal interest are by definition made by those who have either violated a criminal law or have lied about doing so. Second, the Committee noted that the common law provided for admission of declarations against pecuniary interest without a showing of corroborating circumstances, and that the common-law rule had been considered and retained by the original Advisory Committee and Congress. The Committee saw nothing to indicate that the reliability of declarations against pecuniary interest had changed from the time that Rule 804(b)(3) was initially adopted.

3. Defining the corroborating circumstances requirement: As previously noted, there is a good deal of dispute about the meaning of the corroborating circumstances requirement in Rule 804(b)(3). One public comment suggested that the Committee amend the Rule to provide a textual definition of corroborating circumstances. The Committee considered and unanimously rejected this suggestion. Committee members noted that the factors supporting the reliability of a declaration against penal interest will vary with each case. In some cases corroborating evidence might be useful; in others the fact that the statement was spontaneous will be important; and in some cases a combination of independent evidence and reliable circumstances will be sufficient and appropriate. Any textual change also might lead to an unwarranted change in the case law that had developed over the meaning of corroborating circumstances. The Committee noted that it had provided guidance to the bench and bar in the Committee Note to the proposed amendment, which sets out some of the factors that the courts have found relevant to a determination of corroborating circumstances.

A copy of the proposed revised amendment to Rule 804(b)(3), together with the proposed Committee Note, is attached to these minutes.

Privileges

Judge Shadur noted that the Subcommittee on Privileges is engaged in a long-term project to provide a draft of privilege rules that would codify the federal common law as developed under Evidence Rule 501. The Subcommittee has prepared a preliminary draft of seven privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule covering the attorney-client privilege; 3) a rule providing a privilege to a witness to refuse to give adverse testimony against a spouse in a criminal case; 4) a rule providing a privilege for interspousal confidential communications; 5) a rule providing a privilege for communications to physicians and mental health providers; 6) a rule covering the privilege for communications to clerics; and 7) a rule governing waiver.

At previous meetings the full Committee had reviewed five of the draft privilege rules. It had provided comments and suggestions that had been incorporated into the current working drafts. As of the April 2002 Committee meeting the full Committee had tentatively approved the draft rule on waiver and had agreed preliminarily to reject the privilege protecting a witness from giving adverse

A tentative vote was taken on whether the draft should continue to include a privilege for communications to physicians. The Committee voted four to one in favor of retaining the physician-patient privilege in the draft.

The Committee then turned to whether the privilege should be limited to communications to "licensed" mental health providers. The Uniform Rules privilege protects communications to "authorized" providers, but the Privileges Subcommittee believed that the term "authorized" might be too broad, resulting in the shielding of communications to persons who might not be performing responsible therapeutic services. The Committee took a tentative vote and unanimously agreed that the term "licensed" should be included in the draft. It also instructed the Subcommittee to include language in the draft that would allow the privilege to apply when the communication is made to a person under the supervision of a licensed physician or mental health provider, e.g., an intern.

After further discussion, the Committee tentatively accepted the draft's language on the definition of "physician," on who may claim the privilege, and on the application of the privilege to hospitalization proceedings.

The Committee then considered the draft's definition of a crime-fraud exception and made two suggested changes. First, the Committee decided that the exception should be expanded to allow disclosure when the patient confers with the physician in an attempt to assist a third party in committing a fraud. This expansion would cover medical frauds where the payment is sought by someone other than the patient (e.g., a parent who filed the claim). Second, the Committee decided that the exception should be expanded to allow disclosure when the patient confers with the physician in an attempt to "escape detection" from a completed crime.

The Committee next considered the proper scope of the "dangerous patient" exception to the privilege for communication to physicians and other health providers. The dangerous patient exception can be attributed to a footnote in the *Jaffee* case, where the Court stated that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." But despite this language, two lower court cases have distinguished between a duty to disclose in order to protect the patient or others (where the exception to the privilege would apply) and the disclosure of the threat in a court proceeding after the danger had past. The Committee, however, agreed with the thrust of the *Jaffee* opinion: that statements indicating an imminent threat to individuals did not warrant the protection of the privilege under any circumstances. The Committee therefore agreed that the privilege should not protect a communication "in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual."

The Committee next considered whether an exception to the privilege should apply when disclosure is required by law. There was general agreement that the privilege would have to bow to disclosure required by federal law, but there was dispute about whether state law reporting obligations should trump the privilege. Some Committee members expressed concern that deference to state law reporting obligations would render the federal privilege subservient to state law.

Members also noted that the existence of the federal privilege would not prevent the physician or mental health provider from complying with state reporting obligations. It would simply mean that the disclosed communications might still be privileged in a federal proceeding. The Committee ultimately determined that the working draft should not carve out an exception for communications that are required to be reported under state law.

Finally, the Committee instructed the Subcommittee to include a provision for an exception to the privilege where there is a dispute between the patient and the physician or mental health provider. This provision would parallel the exception for disputes between an attorney and client. The Committee agreed that language should be added to specify that if the dispute is over fees, the exception would permit disclosure of confidential communications only to the extent necessary to prove a fact at issue in the fee dispute.

2. Privilege For Communications To Clerics

Federal courts have recognized a common-law privilege for confidential communications to clerics, where the communications are made for the purpose of obtaining spiritual advice or consolation. The Privileges Subcommittee drafted a privilege that would codify this federal case law.

The Committee engaged in an extensive discussion on whether to proceed with this privilege. Committee members expressed significant concern that it would be difficult to define terms like "cleric," "religious" and "spiritual." The DOJ representative noted that many communications made by suspected terrorists could be protected by a privilege covering "religious" communications. Other members noted that, given the fluid nature of religious and spiritual activity in today's society, it would probably be better to leave the development of the cleric privilege to the case law. The Committee ultimately resolved to table the draft privilege for communications to clerics. The Committee also noted that if the privilege is to be considered at a later date, it would have to include at a minimum an exception for communications made in furtherance of crime or fraud. The Subcommittee was also directed to conduct further research to determine whether the term "cleric" could be defined in accordance with some standard found in other law, such as a federal statute.

Long-Term Projects

At the April 2001 Committee meeting the Reporter was directed to prepare a report setting forth the Evidence Rules that might be usefully considered on a long-term basis for possible amendment. The Committee was strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, the Committee recognized that valid arguments for necessary amendments must be seriously considered.

The Reporter submitted a report that set forth Rules that might be considered as part of a long-term project for proposed amendment. As directed by the Committee, the Reporter used three sources of information: 1. Legal scholarship suggesting change to one or more Evidence Rules; 2.

The Uniform Rules project; and 3. Federal case law indicating either a conflict in the meaning of an Evidence Rule, or a divergence between the case law and the text of a Rule.

The Reporter led the Committee through the report, emphasizing that the issue for the Committee at this point was not whether an Evidence Rule should actually be amended. Rather, the question is whether there is a colorable case for an amendment that justifies directing the Reporter to provide a full report an a proposed amendment to the Committee at a subsequent meeting. Using that standard, the Committee considered the following Rules:

1. *Rule 104(b).* Some scholars have suggested that Rule 104(b)'s standard of proof for conditional relevance is misguided. They argue that the relevance of any piece of evidence is relative to all other evidence in the case, and therefore no distinction can be drawn between relevancy and conditional relevancy.

The Committee considered an amendment to Rule 104(b) proposed by an academic, but decided not to proceed. The Committee reasoned that any amendment to Rule 104(b) would upset settled expectations set by the Supreme Court's decision in *Huddleston v. United States.*

2. *Rule 104 new subdivision on privileges:* The Uniform Rules contain a new provision allocating the burden of proof in establishing privileges and exceptions to privileges, and setting forth the standards for holding an *in camera* hearing.

The Committee decided not to proceed with an amendment to Rule 104 that would set forth procedures for establishing privileges and their exceptions. Members noted that these procedural standards are already well-established in federal case law. If any such amendment were to be proposed, the Committee resolved that it should be made part of the long-term project on privileges.

3. *Rule 106:* Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 106 is warranted by the conflict in the case law. Committee members noted that

that a decedent was the initial aggressor; an accused cannot use specific bad act evidence to prove a decedent's character (though the acts can be admitted to prove the defendant's state of mind if he heard about them beforehand).

The Committee decided not to proceed with an amendment to Rule 405. It found that the current Rule provided a proper balance between the defendant's interest in admitting probative evidence and the government's interest in excluding extraneous, possibly confusing and prejudicial evidence of the victim's conduct.

8. *Rule 408:* Rule 408 holds that evidence of a settlement or settlement negotiations is not admissible to prove the validity or amount of a claim. The Rule is not explicit on whether it covers evidence from a civil settlement that is offered in a subsequent criminal case. A number of cases have held that settlement evidence can be admitted in related criminal litigation. Some commentators have argued against such a result on the ground that it is bad policy – it will deter civil settlements if there is a risk of later criminal prosecution.

The Committee directed the Reporter to prepare a full report on a possible amendment to Rule 408 that would clarify whether civil compromise evidence is admissible in subsequent criminal litigation. The Committee found that the public policy questions are debatable enough to warrant further consideration.

9. *Rule 412:* Rule 412, the rape shield law, contains two possible anomalies. First, the Rule provides three exceptions, permitting evidence of the victim's sexual behavior to be admitted under certain limited conditions. One such exception is where its exclusion "would violate the constitutional rights of the defendant." Yet this language is qualified by preceding language stating that the exceptions apply if the evidence of sexual behavior is "otherwise admissible under these rules." As applied to the constitutional rights exception, the language could be read to mean that evidence, if *not* admissible under other rules, must be excluded *even if* its exclusion would violate the constitutional rights of the defendant. This anomaly could be corrected by a technical amendment to the Rule.

Another possible anomaly is that the Rule is inexplicit about whether it excludes evidence that the victim has made prior false claims of rape or has made claims of rape that are later withdrawn. Some courts hold that false claims of rape are "sexual behavior," while other courts disagree. Language could be added to the Rule to clarify whether evidence of false and withdrawn claims should be admitted or excluded.

The Committee directed the Reporter to prepare a full report on possible changes to Rule 412. The Committee found that one of the anomalies could be cured by a technical amendment. It also determined that the question of admissibility of false and withdrawn claims raises important public policy issues that warrant further consideration.

10. *Rules 413-415:* Rules 413-415 provide that evidence of prior sexual misconduct "is admissible" to prove a defendant's propensity to commit sex crimes. The major ambiguity in these Rules is whether evidence of a defendant's prior acts of sexual misconduct are subject to exclusion under Rule 403.

The Committee decided not to proceed with an amendment to Rules 413-415 that would specify that admissibility of a prior act of sexual misconduct is limited by Rule 403. The Committee noted that every case construing these Rules has held that Rule 403 is applicable, so there is no need to amend the Rules in light of this judicial unanimity.

11. *Rule 606(b):* Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. There has been some question in the courts about whether juror affidavit or testimony is admissible if it is offered to prove a clerical error, such as a mathematical miscalculation or checking the wrong box on the verdict form.

The Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether the Rule covers clerical errors. The Committee noted that it would be important, if the Rule were to be amended, to propose language that would clearly circumscribe the scope of any "clerical error" exception to the Rule.

12. *Rule 607:* Rule 607 states categorically that a party may impeach any witness it calls. On its face the Rule permits a party to call a witness solely for the purpose of "impeaching" the witness with evidence that would not otherwise be admissible, such as hearsay. Yet despite the affirmative and permissive language of the Rule, courts have held that a party cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. Thus there is a divergence between the case law and the text of the Rule.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 607 is justified by the divergent case law. The Committee noted that the divergence between the text and the case law created a possible trap for the unwary.

13. *Rule 609*: Rule 609(a)(2) provides that convictions involving "dishonesty or false statement" are automatically admissible to impeach a witness' character for truthfulness. The Rule does not define which crimes involve dishonesty or false statement, and there is dispute in the courts about two matters: whether theft and drug crimes involve dishonesty or false statement, and whether crimes must be admitted under Rule 609(a)(2) when they are committed by deceitful means. The Uniform Rules propose that only those crimes that contain an *element* of untruthfulness should be automatically admitted. This means that drug crimes and theft crimes would not be automatically admitted, because those crimes can be committed without having to lie. This also means that the proponent could not go behind the crime to the underlying facts, because the test would focus on the elements of the crime.

testimony against a spouse. The Committee had provided suggestions on the catch-all provision, the attorney-client privilege, and the privilege for confidential spousal communications that were incorporated into the current working drafts of those privilege rules.

Judge Shadur noted that even if the Committee ultimately agrees with the Subcommittee drafts, it is not bound or required to propose a codification of the privileges. He also noted that even if no amendments are proposed, the Committee would perform a valuable service in preparing a "best principles" version of the federal law of privilege.

At the Committee meeting the Subcommittee sought commentary from the full Committee on two of the draft rules – the privilege for communications to physicians and mental health providers and the privilege for communications to clerics. Because the privilege project is at a very preliminary stage, no final decisions were made on any of the drafts. What follows is a summary of the discussion on the two drafts that were reviewed by the Committee:

1. *The Physician-Mental Health Provider Privilege*

Professor Broun, the consultant to the Privileges Subcommittee, led the discussion on the draft of the privilege for communications to physicians and mental health providers. He noted that the Supreme Court in *Jaffee v. Redmond* established a privilege under federal common law for confidential communications to psychotherapists and other mental health providers. The Court in *Jaffee* left open whether a similar privilege would extend to communications to "general" physicians. Lower federal courts have rejected a more general doctor-patient privilege. The Subcommittee's draft of the privilege would protect confidential communications to physicians.

The Committee considered the merits of extending the *Jaffee* privilege to protect statements to general physicians. The DOJ representative argued that extending the privilege in this way would impair the government's ability to prosecute health fraud cases. Judge Shadur responded that the draft included a crime-fraud exception, and so in a health fraud case the government would be able to obtain communications to physicians that are in furtherance of health fraud. The DOJ representative countered that initial proof of crime or fraud sufficient to invoke the crime-fraud exception may be difficult to obtain, so in fact a physician-patient privilege would impair the government's objectives in health fraud cases.

The Reporter questioned whether a general physician-patient privilege was worth the cost of changing, rather than codifying, federal common law. The privilege would probably not apply in many cases, because in most situations a waiver would be found, for example where a party refers to his or her medical condition as part of a claim or defense. Nor would the privilege protect information about the patient's condition – it would protect only communications that could be separated from that condition. Professor Broun responded that even if the physician-patient privilege would rarely apply, the privilege is worth the effort because it would make a statement that the physician-patient relationship is an important relationship worthy of legal protection.

The Committee next turned to the proposed Committee Note to the amendment to Rule 608(b). The Reporter noted that the Note would have to be changed slightly from that issued for public comment, because the proposed text had been revised to add a change to the last sentence of Rule 608(b). A paragraph was added to the Committee Note that referred to the change to the last sentence of Rule 608(b) as one made for purposes of consistent terminology. A further short paragraph was added to clarify that the change to Rule 608(b) should not raise a negative inference about the retention of the term "credibility" in other Rules.

Finally, the Committee considered a possible objection to certain paragraphs of the Committee Note that were intended to educate the bench and bar about issues that have arisen under Rule 608(b). The Committee unanimously believed that Committee Notes are an important source of education about how an amended Rule is to be applied, and accordingly voted unanimously to retain those parts of the proposed Committee Note.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Rule 608(b) and the accompanying Committee Note, each as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 608(b), together with the proposed Committee Note, is attached to these minutes.

2. Rule 804(b)(3)

In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases.

At its last meeting the Evidence Rules Committee proposed an amendment to Rule 804(b)(3) that would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the statement. This proposal was approved by the Standing Committee to be released for public comment. The most important goal of the proposed amendment was to provide equal treatment to the accused and the prosecution in a criminal case.

Judge Shadur noted that most of the public comment on the proposed amendment was positive. The Department of Justice, however, expressed substantial objections to the proposal, as did some academics. A major criticism of the proposal was that extending the corroborating circumstances requirement to government-proffered statements would create a problematic interface with the government's independent obligation to satisfy the Confrontation Clause in criminal cases.

17. *Rule 704(b):* Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." But some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement agents testifying about the narcotics trade.

The Committee directed the Reporter to prepare a report on Rule 704(b), so that the Committee might consider whether the Rule should be amended to restore its original focus, which was to limit the conclusory testimony of mental health experts in criminal cases.

18. *Rule 706:* Judge Gettleman sent a letter to the Committee suggesting that Rule 706, governing court appointment of expert witnesses, might be amended to make stylistic improvements and to eliminate the "show cause" language that is rarely observed in practice. The Reporter also noted that the ABA Litigation Section has adopted detailed civil trial practice standards providing guidance to trial courts considering appointment of expert witnesses.

The Committee directed the Reporter to prepare a report on Rule 706, covering the suggestions proposed by Judge Gettleman and analyzing the ABA civil trial practice standards to determine whether it might be useful to incorporate them in the text of the Rule.

19. *Rule 801(c):* Academic commentators have suggested that the definition of hearsay in Rule 801(c) should be clarified to provide that the "matter asserted" should include both implied and express assertions.

The Committee decided not to proceed with any amendment to Rule 801(c). The Committee found that the courts have not had a problem in applying the hearsay definition to implied assertions, and that a Rule as fundamental as the hearsay rule should not be amended except in extreme circumstances.

20. *Rule 801(d):* Rule 801(d) provides that certain prior statements of testifying witnesses, and admissions by party-opponents, are "not hearsay" even though these statements clearly fit the definition of hearsay in Rule 801(c). Academic commentators have argued that it is confusing to define a statement as "hearsay" in one subdivision and then declare that it is "not hearsay" in the next subdivision. These commentators suggest that statements covered by Rule 801(d) might better be termed "exemptions" from the hearsay rule, rather than "not hearsay."

The Committee decided not to proceed with an amendment to Rule 801(d) that would style these statements as "exemptions." While the current situation is perhaps not analytically ideal, it has worked well enough in practice. The Committee concluded that the benefits of an amendment in

analytical clarity would be outweighed by the costs of upsetting settled practices and expectations under the current Rule.

21. *Rule 801(d)(1)(B):* Rule 801(d)(1)(B) provides that certain prior consistent statements of testifying witnesses may be admitted for their truth. Courts have held that prior consistent statements not falling within Rule 801(d)(1)(B) might still be admissible – not for their truth but to rehabilitate the witness. Judge Bullock has proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible for their truth whenever they would be admissible to rehabilitate the witness' credibility. The justification for the proposal is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements, and any limiting instruction to use a prior consistent statement for rehabilitation and not for its truth is nonsensical to a jury.

The Committee directed the Reporter to prepare a report on Rule 801(d)(1)(B), to determine whether an amendment is necessary to eliminate any confusion that might be arising under the current Rule.

22. *Rule 803(3):* Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. The original Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended"– implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place.

The Committee directed the Reporter to prepare a report on Rule 803(3), analyzing whether the conflict in the case law warrants a possible amendment to the Rule to clarify whether statements can be admitted to prove the conduct of someone other than the declarant.

23. *Rule 803(4):* Rule 803(4) exempts certain statements made to medical personnel from the hearsay rule. Statements made to doctors for purposes of litigation fall within the exception, because the Rule specifically states that it covers statements made "for purposes of medical *diagnosis* or treatment." The original Advisory Committee recognized that such statements might not be reliable due to a litigation motive, but relied on practical reasons for including statements to litigation doctors within the exception. One reason was that under Rule 703, the doctor would be able to rely on the patient's statements in forming an expert opinion, even though they were hearsay; because the

hearsay statements would get before the jury anyway to illustrate the basis for the expert's opinion, the Advisory Committee figured it would not make much difference if they were also admitted substantively.

Professor Broun, a consultant to the Evidence Rules Committee, has suggested that the original Advisory Committee's reliance on Rule 703 is no longer justified now that Rule 703 was amended in 2000. Under the amendment, hearsay relied upon by an expert cannot be disclosed to the jury unless its probative value in illustrating the expert's basis substantially outweighs the risk that the jury will use the hearsay for its truth. Therefore, it is far less likely than it once was that a litigation doctor would be able to disclose the plaintiff's hearsay statement to the jury in the guise of illustrating the basis for the expert's opinion. Professor Broun suggests that an amendment might be proposed to provide that Rule 803(4) does not cover statements made to medical personnel for purposes of litigation.

The Committee directed Professor Broun to prepare a report on Rule 803(4), so that the Committee could determine whether the Rule should be amended to eliminate its coverage of statements for purposes of litigation. Committee members observed that if such statements were to be eliminated from the hearsay exception, the best solution might be to add a sentence to the Rule specifically eliminating such statements, rather than to delete the term "diagnosis" from the Rule. A statement may be made for purposes of "diagnosis" as opposed to "treatment" and yet not be made for purposes of litigation.

24. *Rule 803(5):* Rule 803(5) provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." The Rule does not explicitly provide for a situation in which a person makes a statement to another person who records the statement, and the recorded statement is not adopted by the person making the statement. Thus the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5).

The Committee directed the Reporter to prepare a report on Rule 803(5), to determine whether the Rule should be amended to specifically permit a record to be admitted where both the person making the statement and the person recording it can vouch for the accuracy of their respective reports.

25. *Rule 803(6):* Rule 803(6) defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the

person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge," not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so – or else the reliability problem created from the report by an outsider must be satisfied by some other circumstances. The Reporter informed the Committee that several States, e.g., Louisiana and Tennessee, have versions of Rule 803(6) that specifically provide criteria for admitting statements in business records where the recorder is relying on information submitted by another person and does have personal knowledge of the accuracy of the information.

The Committee directed the Reporter to prepare a report on Rule 803(6), to determine whether the Rule should be amended to provide criteria to assure the reliability of statements transmitted to the person who prepared the business record.

26. *Rule 803(8):* Rule 803(8) provides a hearsay exception for public reports. Courts and commentators alike have noted that the Rule has several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Reporter informed the Committee that the Uniform Rules have departed from the Federal model, as have many States.

The Committee directed the Reporter to prepare a report on Rule 803(8), to determine whether the Rule should be amended to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances.

27. *Rule 803(18):* Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. This "Learned Treatise" exception does not on its face permit evidence in electronic form, such as a film or video. But some courts have rejected a literal reading the Rule and have upheld the admission of electronic evidence under the learned treatise exception.

The Committee directed the Reporter to prepare a report on Rule 803(18), so that the Committee could determine whether an amendment should be proposed to cover the presentation of "learned treatise" evidence in electronic form.

The Committee directed the Reporter to prepare a full report on the merits of the Uniform Rules version of Rule 609(a)(2). The Committee noted that the case law conflict on the meaning of Rule 609(a)(2) at least warranted further study.

14. *Rule 610:* A public commentator on the proposed amendment to Rule 608(b) suggests that the term "credibility" in Rule 610 should be replaced by "character for truthfulness." Such an amendment would provide that the Rule's limitation on using a witness' religious beliefs for impeachment would apply only if the goal of the impeachment is to attack the witness' character for truthfulness.

The Committee decided not to proceed with any amendment to Rule 610 at this time. Members reasoned that the term "character for truthfulness" might be too narrow as applied to impeachment on the basis of religious beliefs. A policy argument could be made that a person's religious beliefs should be used, where probative, to impeach the witness' mental capacity as well as the witness' character for truthfulness. Moreover, as with the cleric's privilege, difficult questions arise as to what beliefs are "religious" and what are not. The Committee determined that any problems that might arise under the Rule are better left to case law development.

15. *Rule 611:* Several suggestions have been made in the academic literature for possible amendments to Rule 611. One suggestion is to impose a duty on judges to limit the length of cross-examinations where necessary to prevent the admission of marginally relevant evidence. Another is to clarify whether a party can ask leading questions when cross-examining a witness that the judge has identified as hostile to the adversary.

The Committee decided not to proceed with an amendment to Rule 611. The Committee found that the courts have had no problem in administering the Rule. The Rule already gives an appropriate measure of discretion to trial judges to limit both unduly lengthy cross-examination and unnecessary leading questions.

16. *Rule 613(b):* The Rule provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness simply must be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Committee Note, however, some courts have reverted to the common-law rule.

The Committee directed the Reporter to prepare a report on the conflict in the case law in interpreting Rule 613(b), so that the Committee could determine whether an amendment to the Rule would be necessary.

28. *Other Rules:* Time did not permit the Committee to give preliminary consideration to other Rules identified by the Reporter as Rules that might be the subject of long-term consideration, on the basis of scholarly commentary, case law conflict or case law divergence from the text. The Committee therefore decided to defer preliminary consideration of the following Rules until the next meeting: Rules 804(a)(5), 804(b)(1), 806, 807, a possible "tender years" exception to the hearsay rule, and Rules 901(b), 902and 1006.

Conclusion

Judge Shadur noted that his term as Chair of the Evidence Rules Committee expires in September 2002, and that Judge Norton's term on the Committee expires in September as well. Committee members and the Reporter expressed their deep gratitude to Judge Shadur for his stellar work as Committee Chair, and to Judge Norton for his important contributions to the Committee.

The meeting was adjourned at 5:00 p.m., Friday, April 19th.

The next meeting of the Evidence Rules Committee is scheduled for October 18, 2002, in Seattle.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

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the Rule as written covers a "writing or recorded statement," and this terminology may be outdated given the use of email and other electronic transmissions.

4. *Rules 401, 402, and 403:* The Reporter noted that some commentators have suggested that the standards of admitting relevant evidence should be tightened. These commentators claim that a good deal of marginally relevant and time-consuming evidence is admitted under the liberal standards of Rules 401-403.

The Committee refused to proceed on any amendment to Rules 401-403. These are the most important rules of evidence; they are invoked thousands of times a year and are the subject of thousands of opinions. The Committee noted the risk that any change to Rules 401-403 will upset substantial, ingrained expectations and could result in the inadvertent overruling of a large number of opinions.

5. *Rule 404(a):* Rule 404(a) states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"– i.e., only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." This divergent case law could be addressed by an amendment to Rule 404(a) that would permit only an accused "in a criminal case" to offer character evidence in the first instance.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 404(a) is justified by the divergent case law. Committee members noted that any change would be consistent with the original intent of the Rule.

6. *Rule 404(b):* The Uniform Rules now include substantial procedural protections limiting the admission of evidence of uncharged misconduct under Rule 404(b). Protections include a hearing requirement, a requirement of clear and convincing evidence that the uncharged misconduct actually occurred and a provision that the probative value of the uncharged misconduct must outweigh its prejudicial effect.

The Committee decided not to proceed with an amendment to Rule 404(b). The Uniform Rules proposal would substantially change the case law in all the Circuits. Committee members also noted that the proposal would meet substantial opposition from the Justice Department.

7. *Rule 405:* One scholar would amend Rule 405 to permit a homicide defendant to introduce evidence of specific bad acts of the victim when the accused claims self-defense. Currently, an accused can introduce character evidence in the form of reputation or opinion evidence only to prove

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

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

FROM: Honorable A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 10, 2002

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 21-22, 2002, in Tucson, Arizona. The Advisory Committee considered public comments regarding proposed amendments to the Bankruptcy Rules and Official Forms that were published in August 2001.

The proposed amendments published in August 2001 include revisions to four Bankruptcy Rules (Bankruptcy Rules 1007, 2003, 2009, and 2016), and new Rule 7007.1. There were also amendments proposed to Official Forms 1, 5, and 17. The Advisory Committee received only five comments on the proposed amendments and additions to the Rules and Official Forms. Most of the comments were addressed to the amendments to Rule 1007 and the addition of Rule 7007.1. One person commented on the proposed amendment to Rule 2016. Since no person who submitted a written comment requested to appear at the public hearing scheduled for January 4, 2002, the hearing was canceled.

The Advisory Committee considered the written comments on the proposals and approved each of the proposals and will present them to the Standing Committee at its June 2002 meeting for final approval and transmission to the Judicial Conference. The amendments and additions to the

Bankruptcy Rules are set out in Part II A of this Report. The amendments to the Official Forms are set out behind a separate tab in the Agenda Book.

The Advisory Committee also considered proposed amendments to Bankruptcy Rule 1005 and eleven Official Forms to implement a Judicial Conference policy concerning a restriction on the publication of social security numbers. These amendments were published for comment in January 2002, and since the comment period for these amendments did not expire until April 22, 2002, there were no comments to consider at the time of the Committee's meeting. The Committee, however, directed the Subcommittee on Privacy and Public Access to invite persons to participate in a focus group meeting to discuss the issues raised by the proposed amendments. The Subcommittee conducted the focus group meeting in Washington, D.C., on April 12, 2002, the date originally scheduled for the public hearing on the proposals. The Committee did not receive any timely requests to appear at the scheduled public hearing. The Subcommittee approved amendments to Rules 1005, 1007, and 2002, and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19, and will present them to the Standing Committee at its June 2002 meeting for final approval and transmission to the Judicial Conference. The amendments to the Bankruptcy Rules are set out in Part II B of this Report. The amendments to the Official Forms are set out behind a separate tab in the Agenda Book.

The Advisory Committee also approved a preliminary draft of a proposed amendment to Bankruptcy Rule 9014, and will present that amendment to the Standing Committee at its June 2002 meeting with a request that the proposal be published for comment. This amendment is set out in Part II C of this Report.

II. Action Items

A. Proposed Amendments to Bankruptcy Rules 1007, 2003, 2009, and 2016, Proposed New Rule 7007.1, and Official Forms 1, 5, and 17 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

1. *Public Comment.*

The preliminary draft of the proposed amendments and an addition to the Federal Rules of Bankruptcy Procedure and amendments to the Official Forms were published for comment in August 2001, and a public hearing on the preliminary draft was scheduled for January 4, 2002. There were no requests to appear at the hearing.

There were five comments on the proposals. The comment submitted by the Standing Committee on Rules of Practice and Procedure for the United States District Court for the Western District of Michigan stated that it supports all of the proposed amendments to the Bankruptcy Rules. There were no comments on the proposed amendments to the Official Forms. The remaining comments are summarized on a rule-by-rule basis following the text of each rule set out below. The Advisory Committee reviewed these comments and

approved the amendments and addition to the rules and forms as published. The Advisory Committee recommends that the amendments to the Official Forms be approved effective December 1, 2002.

2. *Synopsis of Proposed Amendments and Addition:*

(a) Rule 1007 is amended to add an obligation for corporate debtors to include information regarding their owners that also are corporations. The disclosure provides to the court, at the beginning of the case, some of the information necessary to make judicial disqualification decisions.

(b) Rule 2003 is amended to reflect the enactment of a new subchapter V of chapter 7 of the Bankruptcy Code that makes multilateral clearing organizations eligible for bankruptcy relief.

(c) Rule 2009 is amended to reflect the enactment of a new subschapter V of chapter 7 of the Bankruptcy Code that makes multilateral clearing organizations eligible for bankruptcy relief.

(d) Rule 2016 is amended to implement amendments made to 28 U.S.C. § 1930(a)(6).

(e) Rule 7007.1 is added to require parties in adversary proceedings to disclose corporate entities that own 10% or more of the stock of the party to provide the court with some of the information necessary to make judicial disqualification decisions.

(f) Official Form 1 is the form of a voluntary petition, and it is amended to add a checkbox for designating a clearing bank case filed under subchapter V of chapter 7 of the Bankruptcy Code.

(g) Official Form 5 is the form of an involuntary petition, and it is amended to give notice to child support creditors and their representatives that no filing fee is required and the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994).

(h) Official Form 17 is the form of a Notice of Appeal, and it is amended to give notice to child support creditors and their representatives that no filing fee is required if the appellant files the statement specified by § 304 (g) of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 416 (Oct. 22, 1994).

3. *Text of Proposed Amendments to Rules 1007, 2003, 2009, and 2016, and new Proposed Rule 7007.1, and Proposed Amendments to Official Forms 1, 15, and 17:*

Proposed Amendments Submitted to the Judicial Conference for Approval

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1007. Lists, Schedules, and Statements; Time Limits

(a) LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND CORPORATE OWNERSHIP STATEMENT.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate

* New material is underlined; matter to be omitted is lined through.

ownership statement inaccurate.

* * * * *

COMMITTEE NOTE

This rule is amended to require the debtor to file a corporate ownership statement setting out the information described in Rule 7007.1. Requiring debtors to file the statement provides the court with an opportunity to make judicial disqualification determinations at the outset of the case. This could reduce problems later in the case by preventing the initial assignment of the case to a judge who holds a financial interest in a parent company of the debtor or some other entity that holds a significant ownership interest in the debtor. Moreover, by including the disclosure statement filing requirement at the commencement of the case, the debtor does not have to make the same disclosure filing each time it is involved in an adversary proceeding throughout the case. The debtor also must file supplemental statements as changes in ownership might arise.

Public Comment on Proposed Amendments to Rule 1007:

1.Hon. Walter Shapero (Bankr. E.D. Mich.) urged that the rule requiring disclosure be extended to include disclosure when the ownership of stock is held either directly or indirectly. He also questioned whether the rule should be extended to be applicable to contested matters and to disclosure by members of a creditors committee.

2.Thomas Yerbich (Anchorage, Alaska) suggested that the rule should be extended to involuntary cases as well as voluntary cases.

Changes Made After Publication and Comments.

No changes since publication.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(b) ORDER OF MEETING.

(1) *Meeting of Creditors.* The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a creditors' committee and, if the case is not under subchapter V of chapter 7, the election of a trustee. The presiding officer shall have the authority to administer oaths.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the enactment of subchapter V of

chapter 7 of the Code governing multilateral clearing organization liquidations. Section 782 of the Code provides that the designation of a trustee or alternative trustee for the case is made by the Federal Reserve Board. Therefore, the meeting of creditors in those cases cannot include the election of a trustee.

Public Comment on Proposed Amendments to Rule 2003:

No comments were received.

Changes Made After Publication and Comments.

No changes since publication.

Rule 2009. Trustees for Estates When Joint Administration Ordered

(a) ELECTION OF SINGLE TRUSTEE FOR ESTATES BEING JOINTLY ADMINISTERED. If the court orders a joint administration of two or more estates ~~pursuant to~~ under Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered, unless the case is under subchapter V of chapter 7 of the Code.

(b) RIGHT OF CREDITORS TO ELECT SEPARATE TRUSTEE. Notwithstanding entry of an order for joint administration ~~pursuant to~~ under Rule 1015(b), the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code, unless the case is under subchapter V of chapter 7.

(c) APPOINTMENT OF TRUSTEES FOR ESTATES BEING JOINTLY ADMINISTERED. Chapter 7 Liquidation Cases. Except in a case governed by subchapter V of chapter 7, the United States trustee may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the enactment of subchapter V of chapter 7 of the Code governing multilateral clearing organization liquidations. Section 782 of the Code provides that the designation of a trustee or alternative trustee for the case is made by the Federal Reserve Board. Therefore, neither the United States trustee nor the

creditors can appoint or elect a trustee in these cases.

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 2009:

No comments were received.

Changes Made After Publication and Comments.

No changes since publication.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

* * * * *

(c) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO BANKRUPTCY PETITION PREPARER. Every bankruptcy petition preparer for a debtor shall file a declaration under penalty of perjury and transmit the declaration to the United States trustee within 10 days after the date of the filing of the petition, or at another time as the court may direct, the statement required by § 110(h)(1). The

declaration must disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration must describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. A supplemental statement shall be filed within 10 days after any payment or agreement not previously disclosed.

COMMITTEE NOTE

This rule is amended by adding subdivision (c) to implement § 110(h)(1) of the Code.

Public Comments on Proposed Amendments to Rule 2016:

1. Becky B. Dillon (Sarasota, Florida) offered comments on portions of the rule that were not being amended.

Changes Made After Publication and Comments.

No changes since publication.

Rule 7007.1. Corporate Ownership Statement

(a) REQUIRED DISCLOSURE. Any corporation that is a party to an adversary proceeding, other than the debtor or a

governmental unit, shall file two copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision.

(b) TIME FOR FILING. A party shall file the statement required under Rule 7007.1(a) with its first pleading in an adversary proceeding. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

COMMITTEE NOTE

This rule is derived from Rule 26.1 of the Federal Rules of Appellate Procedure. The information that parties shall supply will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges. This rule does not cover all of the circumstances that may call for disqualification under the subjective financial interest standard of Canon 3C, and does not deal at all with other circumstances that may call for disqualification. Nevertheless, the required disclosures are calculated to reach the majority of circumstances that are likely to call for disqualification under Canon 3C(1)(c).

The rule directs nongovernmental corporate parties to list those corporations that hold significant ownership interests in them. This includes listing membership interests in limited liability companies and similar entities that fall under the definition of a corporation in Bankruptcy Code § 101.

Under Subdivision (b), parties must file the statement with the first document that they file in any adversary proceeding. The rule also requires parties and other persons to file supplemental statements promptly whenever changed circumstances require disclosure or new or additional information.

The Rule does not prohibit the adoption of local rules requiring disclosures beyond those called for in Rule 7007.1.

Public Comments on Proposed Rule 7007.1:

1. Hon. Walter Shapero (Bankr. E.D. Mich.) urged that the scope of the rule be extended to contested matters and that disclosure be required whether the ownership of the stock is held directly or indirectly.

2. Hon. Philip H. Brandt (Bankr. W.D. Wash.) also suggested that the rule be expanded. In particular, he proposed that the disclosure requirements include ownership interests in limited partnerships and similar entities.

3. Thomas Yerbich (Anchorage, Alaska) proposed that the rule require filing of the disclosure statement at a discrete time, for example, thirty days after the filing of the initial pleading, rather than "promptly" as provided in the proposal.

Changes Made After Publication and Comments.

No changes since publication.

Proposed Amendments to Rules 1005, 1007, and 2002, and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19 Submitted for Final Approval by the Standing Committee and Adoption by the Judicial Conference.

1. *Public Comment.*

The preliminary draft of proposed amendments to Rule 1005 and eleven Official Forms was published for comment by the bench and bar in January 2002, and a hearing was scheduled for April 12, 2002, in Washington, D.C. We received no timely requests to appear at the public hearing; however, the Subcommittee on Privacy and Public Access conducted a focus group meeting in Washington on April 12 to consider the views of representatives of private creditors, credit data gatherers, taxing authorities, law enforcement, and the Federal Trade Commission.

The Advisory Committee received thirty-two written comments on the proposed amendments along with the presentations made at the focus group meeting. The comments were submitted by representatives of creditor interests, taxing authorities, credit data collection services, law enforcement, bankruptcy petition preparers, and the United States trustee, among others. The focus group discussion also included a representative from the Federal Trade Commission who oversees the Commission's work relating to identity theft.

The published amendments included only a proposed amendment to Rule 1005 that would have restricted the debtor's social security number on the caption of the petition to the last four digits of the number. The proposal did not include any mechanism for the collection of the full social security number or any means of access to an electronic court record of the case by the full social security number. After considering the written comments and the discussions held in the focus group meeting, the Subcommittee on Privacy and Public Access recommended the adoption of amendments to Rules 1007 and 2002 that would supplement the amendment to Rule 1005 by requiring the debtor to submit, but not file, a statement of his or her social security number that could be used to permit a search of the court records by persons who already have the debtor's social security number. Collection of the social security number also would permit the clerk to include the full number on the notice to creditors of the § 341 meeting of creditors, thereby allowing for the efficient identification of the debtor by creditors in the case. The Advisory

Committee, by mail ballot, accepted the proposal of the Subcommittee and recommends the approval of the amendments to Rules 1005, 1007, and 2002, and the amendments to Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19. Again, approval of the Official Forms is recommended as of December 1, 2002.

Summary of the Comments

Comments on the proposal generally were not addressed to the specific language of the proposed amendment to Bankruptcy Rule 1005, or to any specific amendment within the Official Forms. Rather, they were much more general in nature. Therefore, this summary of the comments is made according to the nature of the comments offered rather than by identification of individual comments.

There were four categories of comments on the proposals. The first group of comments were from bankruptcy petition preparers who object to being required to disclose their social security numbers while other participants in the process do not. The second category of comments came from private creditor interests and taxing authorities who asserted a need for the debtor's full social security number. The third category of comments came from the credit reporting industry and likewise urged the use of the full social security number to protect the integrity and accuracy of the credit reporting industry. The final category of comments came from the United States Trustee Program and the Department of Justice. They asserted that collection of the full social security number is necessary to protect the integrity of the bankruptcy system and to prevent debtors from avoiding prosecution in appropriate cases.

Bankruptcy Petition Preparers

Several bankruptcy petition preparers submitted comments noting their objection to the requirement that their social security numbers be set out on the forms. They noted the potential problem of identity theft and asserted that their social security numbers should be protected to at least the same extent as the debtor's social security number. The Code specifically requires in § 110, however, that bankruptcy petition preparers must include their social security

number on the petition and elsewhere. The Ninth Circuit has upheld this requirement in *Ferm v. United States Trustee (In re Crawford)*, 194 F.3d 954 (9th Cir. 1999). Given the statutory directive, it is not within the Committee's authority to adopt a rule to restrict the disclosure of a bankruptcy petition preparer's social security number.

Private Creditors

The second group of comments addressed creditor concerns about the truncation of the social security number. Both private (VISA, Mastercard, and Toyota Motor Credit, among others) and public (tax, child support, employment services) creditors asserted that limiting the disclosure of the social security number would lead to significant difficulties in identifying debtors. They generally noted that current searches are based on the full nine digit social security number and that reconfiguring their systems to accommodate a four digit number would be very expensive and would lead to potential misidentification of debtors. Misidentification could lead to inadvertent violations of the automatic stay as well as the discharge injunction according to these commentators. Misidentification might also lead to incorrect attribution of a bankruptcy filing to the wrong person thereby affecting that person's credit rating. This concern was expressed by virtually every creditor or creditor representative submitting a comment. These themes were presented as well at the focus group meeting. Mr. Raymond Bell (see comment 02), on behalf of Fleet Credit Card Services, L.P., participated in the focus group meeting and described the matching process employed when a notice of bankruptcy is received. He stated that limiting the social security number to the last four digits would increase costs dramatically because of an increased need for the evaluation of several factors to verify the identity of the debtor as a customer. Representatives of taxing authorities and other public creditors from Arizona, California, Connecticut, Idaho, Massachusetts, New Mexico, New York, Ohio, and Oregon likewise asserted a need for the full social security number. Representatives of the Internal Revenue Service participated in the focus group meeting and noted as well that the Service relies on the full social security number and would be significantly disadvantaged if the number reported to them were reduced to the last four digits.

Credit Reporting Agencies

Representatives of the credit reporting industry submitted the third category of comments. Mr. Stuart Pratt of the Consumer Data Industry Association submitted written comments and participated in the focus group discussion. Mr. Pratt offered information about the number of persons in the United States with identical or nearly identical names who might also have the same last four digits of a social security number. He also argued that timely and accurate reporting of this information is essential not just to specific creditors of the debtor, but to the efficient operation of the credit system generally. A representative of LEXIS/NEXIS made a similar point as well in the written comments he submitted. In their views, the accuracy of credit reporting would suffer with a truncation of the social security number on a debtor's petition. They noted as well that limiting access would, at the very least, create delays in the reporting of the information.

United States Trustee Program and the Department of Justice

The last category of comments came from the United States trustee program (including an individual employee of the United States trustee program, in her individual capacity and not as a representative of the program) and the Department of Justice. These comments focused on the need for complete and accurate information both to ensure the integrity of the system and to prevent criminal activity by persons who would use false social security numbers. The comment of the United States trustee program noted the efforts recently undertaken to verify the identity of debtors to protect against fraudulent filers. The Department of Justice indicated that it uses personal identifiers from bankruptcy files for a variety of investigative purposes in cases of credit card fraud, bankruptcy fraud, and identity theft. According to the Department, limiting access to this information could hamper the investigation of a wide range of criminal activity. Finally, the Department of the Treasury also objected to the truncation of the social security number (for the reasons stated by other creditors, both public and private), but Treasury also objected to any truncation of the Employer Tax Identification Number. It noted that the EIN does not present the same privacy concerns that

the social security number poses, and the EIN is used extensively by the Department and should continue to be disclosed fully by the debtor.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1005 is amended to require the debtor to list all names used in the six years preceding the filing of the petition, and to include on the caption appropriate numerical identifiers, but using only the last four digits of the social security number.

(b) Rule 1007 is amended to require the debtor to submit a verified statement of his or her full social security number. The statement is submitted, but it is not filed in the case and does not become a part of the court record. Therefore, the full social security number does not become a part of the electronic case record that would be available to the public either through internet access or by a search of the paper records at the court.

(c) Rule 2002 is amended to require the clerk to include the debtor's full social security number on the § 341 notice to creditors. The full number should be included only on the notices sent to the creditors and not on the copy of the notice that becomes part of the court record.

PROPOSED AMENDMENTS TO THE FEDERAL RULES

OF BANKRUPTCY PROCEDURE (Continued)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

Rule 1005. Caption of Petition

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the following information about the debtor: ~~the~~ name, employer identification number, last four digits of the social security number, any other federal tax identification number, ~~and employer's tax identification number of the debtor~~ and all other names used ~~by the debtor~~ within six years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to the petitioners.

COMMITTEE NOTE

The rule is amended to implement the Judicial Conference policy to limit the disclosure of a party's social security number and similar

** New material is underlined; matter to be omitted is lined through.

identifiers. Under the rule, as amended, only the last four digits of the debtor's social security number need be disclosed. Publication of the employer identification number does not present the same identity theft or privacy protection issues. Therefore, the caption must include the full employer identification number.

Debtors must submit with the petition a statement setting out their social security numbers. This enables the clerk to include the full social security number on the notice of the section 341 meeting of creditors, but the statement itself is not submitted in the case or maintained in the case file.

Public Comment on Proposed Amendments to Rule 1005:

The comments by private creditor interests, the credit reporting industry, the United States trustee, and the Justice Department all expressed concern that permitting debtors to limit the listing of social security numbers to the final four digits would create problems in identifying the debtors and acting accordingly. This could lead to inadvertent violations of the automatic stay and the discharge injunction. It would limit the ability of creditors and trustee to determine whether a particular debtor has obtained bankruptcy relief previously and is engaging in a serial bankruptcy filing. It could also hamper law enforcement efforts to prosecute debtor for bankruptcy fraud and related crimes.

Changes Made After Publication and Comments.

The rule was changed only slightly after publication. The rule was changed to make clear that only the debtor's social security number is truncated to the final four digits, but other numerical identifiers must be set out in full. The rule also was amended to include a

requirement that a debtor list other federal taxpayer identification numbers that may be in use.

Rule 1007. Lists, Schedules, and Statements; Time Limits

* * * * *

(c) TIME LIMITS. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the schedules and statements shall be filed by the debtor within 15 days of the entry of the order for relief. Schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to

any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(f) STATEMENT OF SOCIAL SECURITY NUMBER. An individual debtor shall submit with the petition a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 15 days after the entry of order for relief.

* * * * *

COMMITTEE NOTE

The rule is amended to add a requirement that a debtor submit a statement setting out the debtor's social security number. The addition is necessary because of the corresponding amendment to Rule

1005 which now provides that the caption of the petition includes only the final four digits of the debtor's social security number. The debtor submits the statement, but it is not filed, nor is it included in the case file. The statement provides the information necessary to include on the service copy of the notice required under Rule 2002(a)(1). It will also provide the information to facilitate the ability of creditors to search the court record by a search of a social security number already in the creditor's possession.

Public Comment on Proposed Amendments to Rule 1007:

The published amendments did not include any amendment to Rule 1007. Thus, there were no comments on the proposal. However, the rule amendment itself is in response to the public comments received by the Advisory Committee.

Changes Made After Publication and Comments.

The rule amendment is made in response to the extensive commentary that urged the Advisory Committee to continue the obligation contained in current Rule 1005 that a debtor must include his or her social security number on the caption of the bankruptcy petition. Rule 1005 is amended to limit that disclosure to the final four digits of the social security number, and Rule 1007 is amended to reinstate the obligation in a manner that will provide more protection of the debtor's privacy while continuing access to the information to those persons with legitimate need for that data. The debtor must disclose the information, but the method of disclosure is by a verified statement that is submitted to the clerk. The statement is not filed in the case and does not become a part of the court record. Therefore, it enables the clerk to deliver that information to the creditors and the trustee in the case, but it does not become a part of the court record

governed by § 107 of the Bankruptcy Code and is not available to the public.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code, which notice, unless the court orders otherwise, shall include the debtor's employer identification number, social security number, and any other federal taxpayer identification number;

* * * * *

COMMITTEE NOTE

Subdivision (a)(1) of the rule is amended to direct the clerk or other person giving notice of the § 341 or § 1104(b) meeting of creditors to include the debtor's full social security number on the

notice. Official Form 9, the form of the notice of the meeting of creditors that will become a part of the court's file in the case, will include only the last four digits of the debtor's social security number. This rule, however, directs the clerk to include the full social security number on the notice that is served on the creditors and other identified parties, unless the court orders otherwise in a particular case. This will enable creditors and other parties in interest who are in possession of the debtor's social security number to verify the debtor's identity and proceed accordingly. The filed Official Form 9, however, will not include the debtor's full social security number. This will prevent the full social security number from becoming a part of the court's file in the case, and the number will not be included in the court's electronic records. Creditors who already have the debtor's social security number will be able to verify the existence of a case under the debtor's social security number, but any person searching the electronic case files without the number will not be able to acquire the debtor's social security number.

Public Comment on Proposed Amendments to Rule 2002:

The published amendments did not include any amendment to Rule 2002. Thus, there were no comments on the proposal. However, the rule amendments are made in response to the comments received by the Advisory Committee.

Changes Made After Publication and Comments.

The rule amendment was made in response to concerns of both private creditors and taxing authorities that truncating the social security number of a debtor to the last four digits would unduly hamper their ability to identify the debtor and govern their actions accordingly. Therefore, the Advisory Committee amended Rule 2002

to require the clerk to include the debtor's full social security number on the notice informing creditors of the § 341 meeting and other significant deadlines in the case. This is essentially a continuation of the practice under the current rules, and the amendment is necessary because of the amendment to Rule 1005 that restricts publication of the social security number on the caption of the petition to the final four digits of the number.

C. Preliminary Draft of Proposed Amendments to Bankruptcy Rule 9014

1. *Synopsis of Proposed Amendments:*

Rule 9014 is amended to limit the applicability of the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure made applicable in contested matters in bankruptcy cases by Bankruptcy Rule 7026. Contested matters typically are resolved more quickly than the time that would elapse under the normal application of the mandatory disclosure provisions of Fed. R. Civ. P. 26. Those disclosure requirements continue to apply in adversary proceedings, and the court can order that they apply in a particular contested matter.

2. *Text of Proposed Amendments to Bankruptcy Rule 9014*

(Proposed Amendments Submitted for Publication)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE***

Rule 9014. Contested Matters

* * * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless ~~Unless~~ the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as

*** New material is underlined; matter to be omitted is lined through.

provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

COMMITTEE NOTE

The rule is amended to provide that the mandatory disclosure requirements of Fed. R. Civ. P. 26, as incorporated by Rule 7026, do not apply in contested matters. The typically short time between the commencement and resolution of most contested matters makes the mandatory disclosure provisions of Rule 26 ineffective. Nevertheless, the court may by local rule or by order in a particular case provide that these provisions of the rule apply in a contested matter.

III. Information Items

A. *Proposed Bankruptcy Legislation*

As has been the case for the past several years, Congress continues to consider extensive reform of the Bankruptcy Code. Both the House and Senate have passed reform bills, and the Conference Committee has met to work out the differences in the bills. As of the date of the preparation of this Report, published reports on the workings of the Conference Committee

indicate that there are few, and perhaps only one, issues remaining to be resolved by that Committee. If the differences are resolved, the Conference bill will be returned to the House and Senate for vote, and if passed, sent to the President for his signature. President Bush has indicated that he supports passage of the bill.

The Advisory Committee has taken steps to prepare appropriate amendments to the Bankruptcy Rules and Official Forms in the event that the reform legislation is enacted. Professors Jacoby and Markell continue to assist the Advisory Committee as consultants on both the consumer and business aspects of bankruptcy reform. Since the effective date of the legislation is 180 days after enactment, for most provisions, the Advisory Committee is actively preparing and considering amendments and additions to the Bankruptcy Rules and Official Forms.

B. *Draft Minutes*

Draft minutes of the March 2002 meeting of the Advisory Committee are attached.

ATTACHMENT

AMENDMENTS TO OFFICIAL FORMS 1, 5, AND 17:

Public Comment on Proposed Amendments to Official Forms 1, 5, and 17:

No comments were received.

Changes Made After Publication. No changes since publication.

(Official Form 1) (12/02)

FORM B1	United States Bankruptcy Court District of _____	Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):

Location of Principal Assets of Business Debtor (if different from street address above):

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s)
☐ Corporation
☐ Partnership
☐ Other _____
☐ Railroad
☐ Stockbroker
☐ Commodity Broker
☐ Clearing Bank

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7
☐ Chapter 9
☐ Chapter 11
☐ Chapter 12
☐ Chapter 13
☐ Sec. 304 - Case ancillary to foreign proceeding

Nature of Debts (Check one box)

☐ Consumer/Non-Business
☐ Business

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	**Relationship:**	**Judge:**

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

COMMITTEE NOTE

The form has been amended to provide a checkbox for designating a clearing bank case filed under subchapter V of chapter 7 of the Code enacted by § 112 of Pub. L. No. 106-554 (December 21, 2000).

FORM B5
(12/02)

United States Bankruptcy Court

District of _____

INVOLUNTARY PETITION

IN RE (Name of Debtor - If Individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
SOC. SEC./TAX I.D. NO. (If more than one, state all.)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	MAILING ADDRESS OF DEBTOR (If different from street address)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe:
- ☐ Debts are primarily consumer debts
- ☐ Debts are primarily business debts (complete sections A and B)

TYPE OF DEBTOR
- ☐ Individual
- ☐ Partnership
- ☐ Other: _____
- ☐ Corporation Publicly Held
- ☐ Corporation Not Publicly Held

A TYPE OF BUSINESS (Check one)
- ☐ Professional
- ☐ Retail/Wholesale
- ☐ Railroad
- ☐ Transportation
- ☐ Manufacturing/ Mining
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Construction
- ☐ Real Estate
- ☐ Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS
(Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.
3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy

FORM 5 Involuntary Petition
(12/02)

Name of Debtor ____________________

Case No ____________________
(court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X ____________________ Signature of Petitioner or Representative (State title)	X ____________________ Signature of Attorney Date
Name of Petitioner Date Signed	Name of Attorney Firm (If any)
Name & Mailing Address of Individual Signing in Representative Capacity	Address
	Telephone No.
X ____________________ Signature of Petitioner or Representative (State title)	X ____________________ Signature of Attorney Date
Name of Petitioner Date Signed	Name of Attorney Firm (If any)
Name & Mailing Address of Individual Signing in Representative Capacity	Address
	Telephone No.
X ____________________ Signature of Petitioner or Representative (State title)	X ____________________ Signature of Attorney Date
Name of Petitioner Date Signed	Name of Attorney Firm (If any)
Name & Mailing Address of Individual Signing in Representative Capacity	Address
	Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

______continuation sheets attached

COMMITTEE NOTE

The form is amended to give notice that no filing fee is required if a child support creditor or its representative is a petitioner, and if the petitioner also files a form detailing the child support debt, its status, and other characteristics, as specified in § 304(g) of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994).

Official Form 17
(12/02)

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

[Caption as in Form 16A, 16B, 16C, or 16D, as appropriate]

NOTICE OF APPEAL

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____, _____.
(month) (year)

The names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Dated: _____

Signed: _____
Attorney for Appellant (or Appellant, if not represented by an Attorney)

Attorney Name: _____

Address: _____

_____

Telephone No: _____

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.

If a child support creditor or its representative is the appellant, and if the child support creditor or its representative files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended to give notice that no filing fee is required if a child support creditor or its representative is the appellant, and if the child support creditor or its representative files a form detailing the child support debt, its status, and other characteristics, as specified in § 304(g) of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-396, 108 Stat. 4106 (Oct. 22, 1994).

AMENDMENTS TO OFFICIAL FORMS 1 ,3 ,5 ,6 ,7 ,8 ,9 ,10, 16A, 16C, AND 19:

Public Comments on the Proposed Amendments to the Official Forms:

Consistent with the comments received on the proposed amendments to the Bankruptcy Rules to implement the Judicial Conference policy on the restriction on the use of social security numbers, the comments on the proposed amendments to the Official Forms were generic in nature and did not address any specific language contained in the forms. The issues raised and arguments offered were contained in the comments on the amendments to Rule 1005 as set out in the Report. The commentators generally expressed concern that they have the ability to identify the debtor by using a full social security number. The amendments to the Official Forms as set out below implement the Judicial Conference policy by limiting the publication of social security numbers to the final four digits.

Several bankruptcy petition preparers objected to the requirement that they include their full social security number on Official Form 19. That requirement is set out in § 110 of the Bankruptcy Code, however, and cannot be altered by the Official Form.

(Official Form 1) (12/03)

FORM B1	**United States Bankruptcy Court** **District of** _____	**Voluntary Petition**

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. No./Complete EIN or other Tax I.D. No. (if more than one, state all):	Last four digits of Soc. Sec.No./Complete EIN or other Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):

Location of Principal Assets of Business Debtor (if different from street address above):

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s)
☐ Corporation
☐ Partnership
☐ Other _____
☐ Railroad
☐ Stockbroker
☐ Commodity Broker
☐ Clearing Bank

Nature of Debts (Check one box)

☐ Consumer/Non-Business
☐ Business

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7
☐ Chapter 9
☐ Chapter 11
☐ Chapter 12
☐ Chapter 13
☐ Sec. 304 - Case ancillary to foreign proceeding

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	**Relationship:**	**Judge:**

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number (Required by 11 U.S.C.§ 110)

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

COMMITTEE NOTE

The form is amended to require the debtor to disclose only the last four digits of the debtor's social security number to afford greater privacy to the individual debtor, whose bankruptcy case records may be available on the Internet. Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer requires a petition preparer to provide the full social security number of the individual who actually prepares the document.

Official Form 3
(12/03)

United States Bankruptcy Court

_____ District Of _____

In re _____, Debtor

Case No. _____

Chapter _____

APPLICATION TO PAY FILING FEE IN INSTALLMENTS

1. In accordance with Fed. R. Bankr. P. 1006, I apply for permission to pay the Filing Fee amounting to $_____ in installments.

2. I certify that I am unable to pay the Filing Fee except in installments.

3. I further certify that I have not paid any money or transferred any property to an attorney for services in connection with this case and that I will neither make any payment nor transfer any property for services in connection with this case until the filing fee is paid in full.

4. I propose the following terms for the payment of the Filing Fee.*

$ _____ Check one ☐ With the filing of the petition, or
☐ On or before _____

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

* The number of installments proposed shall not exceed four (4), and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. Fed. R. Bankr. P. 1006(b)(2).

5. I understand that if I fail to pay any installment when due my bankruptcy case may be dismissed and I may not receive a discharge of my debts.

_____
Signature of Attorney Date

_____
Name of Attorney

_____
Signature of Debtor Date
(In a joint case, both spouses must sign.)

_____
Signature of Joint Debtor (if any) Date

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document. I also certify that I will not accept money or any other property from the debtor before the filing fee is paid in full.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110(c).)

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

x_____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer requires a petition preparer to provide the full social security number of the individual who actually prepares the document pursuant to § 110(c) of the Code.

FORM B5
(12/03)

United States Bankruptcy Court

District of _____

INVOLUNTARY PETITION

IN RE (Name of Debtor - If Individual. Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
LAST FOUR DIGITS OF SOC. SEC. NO./Complete EIN or other TAX I.D. NO. (If more than one, state all.)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	MAILING ADDRESS OF DEBTOR (If different from street address)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe:
- ☐ Debts are primarily consumer debts
- ☐ Debts are primarily business debts

B BRIEFLY DESCRIBE NATURE OF BUSINESS

TYPE OF DEBTOR
- ☐ Individual
- ☐ Partnership
- ☐ Corporation
- ☐ Other: _____
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Railroad

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

FILING FEE (Check one box)

☐ Full Filing Fee attached

☐ Petitioner is a child suport creditor or its representative, and the form specified in § 304g) of the Bankruptcy Reform Act of 1994 is attached.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS
(Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.
3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required

FORM 5 Involuntary Petition
(6/92)

Name of Debtor _____

Case No. _____
(court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney Firm (If any)

_____
Address

_____
Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____continuation sheets attached

COMMITTEE NOTE

The form is amended to require the petitioner to disclose the debtor's employer identification number, if any, and only the last four digits of the debtor's social security number to afford greater privacy to the individual debtor, whose bankruptcy case records may be available on the Internet. The form also is amended to delete the request for information concerning the "Type of Business," as this data no longer is collected for statistical purposes.

Form B6D
(12/03)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests. List creditors in alphabetical order to the extent practicable. If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions above.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO			VALUE $					
ACCOUNT NO			VALUE $					

_____continuation sheets attached

Subtotal➤ (Total of this page) $

Total➤ (Use only on last page) $

(Report total also on Summary of Schedules)

Form B6D - Cont
(12/03)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

(Continuation Sheet)

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE AND ACCOUNT NUMBER (See instructions.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.			VALUE $					
ACCOUNT NO			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					

Sheet no. ___ of ___continuation sheets attached to Schedule of Creditors Holding Secured Claims

Subtotal➤ (Total of this page) $

Total➤ (Use only on last page) $

(Report total also on Summary of Schedules)

Form B6E
(12/03)

In re _____, Debtor

Case No._____ (if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name, mailing address, including zip code, and last four digits of the account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H,""W,""J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4,650* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4,650* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to $2,100* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

Form B6E
(12/03)

In re _____, Case No._____
Debtor (if known)

☐ **Alimony, Maintenance, or Support**

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9)

* Amounts are subject to adjustment on April 1, 2004, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

Form B6E - Cont
(12/03)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
(Continuation Sheet)

TYPE OF PRIORITY

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.								
ACCOUNT NO								
ACCOUNT NO.								
ACCOUNT NO.								
ACCOUNT NO.								

Sheet no. ___ of ___ sheets attached to Schedule of Creditors Holding Priority Claims

Subtotal➤ (Total of this page) $

Total➤ (Use only on last page of the completed Schedule E.) (Report total also on Summary of Schedules) $

Form B6F - Cont
(12/03)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO							

Sheet no. ___ of ___sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal ➤ $
(Total of this page)
Total ➤ $
(Use only on last page of the completed Schedule E.)
(Report total also on Summary of Schedules)

Form B6F (12/03)

In re _____, Case No. _____

Debtor (If known)

SCHEDULE F- CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community maybe liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions, above.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
_____continuation sheets attached				Subtotal ➤			$
				Total ➤			$

(Report also on Summary of Schedules)

Form B6F - Cont
(12/03)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							

Sheet no. ___ of ___sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal ➤ (Total of this page) $

Total ➤ $

(Use only on last page of the completed Schedule E.)
(Report total also on Summary of Schedules)

Form B6I
(12/03)

In re _____, Case No. _____
Debtor (if known)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by a married debtor in a chapter 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP	AGE

Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (pro rate if not paid monthly.)	$	$
Estimated monthly overtime	$	$
SUBTOTAL	$	$
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$	$
b. Insurance	$	$
c. Union dues	$	$
d. Other (Specify: _____)	$	$
SUBTOTAL OF PAYROLL DEDUCTIONS	$	$
TOTAL NET MONTHLY TAKE HOME PAY	$	$
Regular income from operation of business or profession or farm (attach detailed statement)	$	$
Income from real property	$	$
Interest and dividends	$	$
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$	$
Social security or other government assistance (Specify) _____	$	$
Pension or retirement income	$	$
Other monthly income	$	$
(Specify) _____	$	$
_____	$	$
TOTAL MONTHLY INCOME	$	$

TOTAL COMBINED MONTHLY INCOME $_____ (Report also on Summary of Schedules)

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document:

Official Form 6-Cont.
(12/03)

In re _____ , Debtor

Case No. _____ (If known)

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ (Total shown on summary page plus 1.) sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Date _____ Signature. _____ Debtor

Date _____ Signature: _____ (Joint Debtor, if any)

[If joint case, both spouses must sign]

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U S C § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document

_____ Printed or Typed Name of Bankruptcy Petition Preparer

_____ Social Security No. (Required by 11 U S.C. § 110(c))

_____

_____ Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person

X _____ Signature of Bankruptcy Petition Preparer

_____ Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U S C § 110; 18 U S C § 156

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION OR PARTNERSHIP

I, the _____ [the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership] of the _____ [corporation or partnership] named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information, and belief. (Total shown on summary page plus 1.)

Date _____ Signature: _____

_____

[Print or type name of individual signing on behalf of debtor.]

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

Penalty for making a false statement or concealing property Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U S C §§ 152 and 3571

COMMITTEE NOTE

The instructions to Schedule D (Creditors Holding Secured Claims), Schedule E (Creditors Holding Unsecured Priority Claims), and Schedule F (Creditors Holding Unsecured Nonpriority Claims) are amended to inform the debtor that the debtor must list the last four digits of any account number with the listed creditor, and that the debtor may, in its discretion, include the entire account number in the schedules. Schedule I (Current Income of Individual Debtor(s)) is amended to provide greater privacy to minors and other dependents of the debtor by deleting the requirement that the debtor disclose their names. Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer requires a petition preparer to provide the full social security number of the individual who actually prepares the document.

Form 7
(12/03)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re: _____, (Name) Debtor

Case No. _____ (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE (if more than one)

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

---

3. Payments to creditors

None ☐ a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

---

4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

---

5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

---

6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY

7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

---

8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

---

9. Payments related to debt counseling or bankruptcy

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

---

10. Other transfers

None ☐ List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

---

12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

---

13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

---

14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

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16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the **six-year period** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

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17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law

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None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

18 . Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NO. (EIN)	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

19. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

20. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

21 . Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

22 . Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

23 . Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

24. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION TAXPAYER IDENTIFICATION NUMBER (EIN)

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25. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PENSION FUND TAXPAYER IDENTIFICATION NUMBER (EIN)

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* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief

Date _____ Signature _____

_____
Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor]

____ continuation sheets attached

Penalty for making a false statement Fine of up to $500,000 or imprisonment for up to 5 years, or both 18 U S C § 152 and 3571

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U S C § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No
(Required by 11 U S C § 110(c))

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer requires a petition preparer to provide the full social security number of the individual who actually prepares the document.

Official Form 8
(12/03)

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter 7

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. I intend to do the following with respect to the property of the estate which secures those consumer debts:

   a. *Property to Be Surrendered.*

Description of Property **Creditor's name**

b. Property to Be Retained *[Check any applicable statement.]*

Description of Property	Creditor's Name	Property is claimed as exempt	Property will be redeemed pursuant to 11 U.S.C § 722	Debt will be reaffirmed pursuant to 11 U.S.C § 524(c)

Date: _____

_____
Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110(c).)

_____

_____
Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X_____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C § 110; 18 U.S.C. § 156.

Form 8

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer requires a petition preparer to provide the full social security number of the individual who actually prepares the document.

FORM B9A (Chapter 7 Individual or Joint Debtor No Asset Case (12/03)

UNITED STATES BANKRUPTCY COURT _____ **District of** _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]

or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D.No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions: Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: Telephone number:	For the Court: Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9B (Chapter 7 Corporation/Partnership No Asset Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights.
All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor (name and address): Telephone number:	Telephone number:

Meeting of Creditors:

Date: / /	Time: ( ) A.M. ( ) P.M.	Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9C (Chapter 7 Individual or Joint Debtor Asset Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address): Telephone number:
Attorney for Debtor(s) (name and address): Telephone number:	

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions: Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9D (Chapter 7 Corporation/Partnership Asset Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).]

or

[A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor (name and address): Telephone number:	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9E (Chapter 11 Individual or Joint Debtor Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]

or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim: Notice of deadline will be sent at a later time.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9E (ALT.) (Chapter 11 Individual or Joint Debtor Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9F (Chapter 11 Corporation/Partnership Asset Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____ (date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Attorney for Debtor (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Deadline to File a Proof of Claim: Notice of deadline will be sent at a later time.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9F (ALT.) (Chapter 11 Corporation/Partnership Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____ (date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Attorney for Debtor (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit):

For a governmental unit:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9G (Chapter 12 Individual or Joint Debtor Family Farmer) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:
Bankruptcy Trustee (name and address): Telephone number:	

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9H (Chapter 12 Corporation/Partnership Family Farmer) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 12 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address): Telephone number:
Attorney for Debtor (name and address): Telephone number:	

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9I (Chapter 13 Case) (12/03)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 13 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Soc. Sec. No./Complete EIN or other Taxpayer I.D. No.:
All Other Names used by the Debtor(s) in the last 6 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address): Telephone number:
Attorney for Debtor(s) (name and address): Telephone number:	

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines: Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Form 9

COMMITTEE NOTE

The form is amended to add to the information provided to creditors, the trustee and the United States trustee, all the names used by the debtor during the six years prior to the filing of the petition. The form includes the debtor's full employer identification number, if any, as well as the last four digits of the debtor's social security number. Rule 2002(a)(1) also is amended to direct the clerk to include the debtor's full social security number and employer identification number on the notices served on the United Sates trustee, the trustee, and creditors. This will enable creditors to identify the debtor accurately. The copy of Official Form 9 included in the case file, however, will show only the last four digits of the debtor's social security number. This should afford greater privacy to the individual debtor, whose bankruptcy case records may be available on the Internet.

FORM B10 (Official Form 10) (12/03)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property):

Name and address where notices should be sent:

Telephone number:

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated: _____

1. Basis for Claim

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other _____

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Last four digits of SS #: _____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ _____ (unsecured) _____ (secured) _____ (priority) _____ (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle
☐ Other_____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. Unsecured Nonpriority Claim $_____

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,650),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
☐ Up to $2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units-11 U.S.C. § 507(a)(8).
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____).

**Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

8. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

THIS SPACE IS FOR COURT USE ONLY

Penalty for presenting fraudulent claim. Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Secured Claim

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also *Unsecured Claim*.)

Unsecured Claim

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims.*

Items to be completed in Proof of Claim form (if not already filled in)

Court, Name of Debtor, and Case Number:
Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:
Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim:
Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in the last four digits of your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:
Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:
If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:
Fill in the applicable amounts, including the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

5. Secured Claim:
Check the appropriate place if the claim is a secured claim. You must state the type and value of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

6. Unsecured Nonpriority Claim:
Check the appropriate place if you have an unsecured nonpriority claim, sometimes referred to as a "general unsecured claim". (See DEFINITIONS, above.) If your claim is partly secured and partly unsecured, state here the amount that is unsecured. If part of your claim is entitled to priority, state here the amount **not** entitled to priority.

7. Unsecured Priority Claim:
Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

8. Credits:
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

9. Supporting Documents:
You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

Form 10

COMMITTEE NOTE

The form is amended to require a wage, salary, or other compensation creditor to disclose only the last four digits of the creditor's social security number to afford greater privacy to the creditor. A trustee can request the full information necessary for tax withholding and reporting at the time the trustee makes a distribution to creditors.

Official Form 16A
(12/03)

Form 16A. CAPTION (FULL)

United States Bankruptcy Court

_____ District Of _____

In re _____, *Set forth here all names including married, maiden, and trade names used by debtor within last 6 years.]* Debtor	)	Case No. _____
Address _____ _____	)	Chapter _____
Employer's Tax Identification (EIN) No(s). [if any]:_____ _____ Last four digits of Social Security No(s).:_____	)	

[Designation of Character of Paper]

Form 16A

COMMITTEE NOTE

The form is amended to require disclosure of only the last four digits of the debtor's social security number to afford greater privacy to the individual debtor, whose bankruptcy case records may be available over the Internet.

Official Form 16C
(12/03)

FORM 16C. CAPTION OF COMPLAINT IN ADVERSARY PROCEEDING FILED BY A DEBTOR

[Abrograted]

Form 16C

COMMITTEE NOTE

The form is abrogated. An amendment to Official Form 16A directs that only the last four digits of the debtor's social security number should appear in a caption. Section 342(c) of the Bankruptcy Code continues to require the debtor to provide a creditor with the debtor's name, address, and taxpayer identification number on any notice the debtor is required to give to the creditor. An individual debtor can fulfill this requirement by including the debtor's social security account number on only the creditor's copy of any notice or summons the debtor may serve on the creditor.

Form 19. CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

[Caption as in Form 16B.]

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110(c).)

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form 19

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer requires a petition preparer to provide the full social security number of the individual who actually prepares the document.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 21-22, 2002
Tucson, Arizona

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Bernice B. Donald
District Judge Norman C. Roettger, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. District Judge Thomas W. Thrash, Jr., liaison to the Committee on Rules of Practice and Procedure (Standing Committee), attended. District Judge Adrian G. Duplantier, former chairman of the Committee, and Henry J. Sommer, Esquire, a former member of the Committee, also attended. Bankruptcy Judge Dennis Montali attended as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts (Administrative Office, also attended.

The following additional persons attended all or part of the meeting: Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, General Counsel, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; Professor Bruce A. Markell, and Professor Melissa B. Jacoby, consultants to the Committee; Bankruptcy Judge Eileen W. Hollowell, Tucson, AZ; John K. Rabiej, Chief, and James N. Ishida, staff attorney, Rules Committee Support Office, Administrative Office; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the chairman appear in **bold.**

Introductory Matters

The Chairman introduced the Committee's new member, Judge McFeeley, and welcomed all the members, liaisons, advisers, and guests to the meeting.

The Committee approved the minutes of the March 2001 meeting. [The meeting that had been scheduled for September 13-14, 2001, was canceled due to the September 11 attacks on New York City and Washington, DC.]

The Chairman briefed the Committee on the events of the June 2001 and January 2002 meetings of the Standing Committee and on certain actions taken by the Judicial Conference in September 2001. At the June 2001 Standing Committee meeting, the seven amended rules and one new rule the Committee had forwarded for adoption were approved and sent to the Judicial Conference, but amended Rule 2014 had drawn two negative votes. Later in the summer, Rule 2014 proved controversial again when the Judicial Conference's Executive Committee met to consider the calendar for the September meeting of the Judicial Conference. Rather than risk disapproval of the amendments, Judge Small said he and Judge Anthony J.Scirica, chairman of the Standing Committee, had decided to withdraw Rule 2014 from the package of proposed amendments and send the rule back to the Advisory Committee for further study. The Judicial Conference, which was in session on September 11 when the attacks occurred, adjourned and acted later by mail ballot to approve the reduced package of proposed rules amendments and to approve two further items of interest to the Committee, a compilation of "Model Local Bankruptcy Court Rules for Electronic Filing" and a "Policy on Privacy and Public Access to Electronic Court Files," both proposed by the Committee on Court Administration and Case Management (CACM). In January 2002, the Standing Committee approved publication of privacy-related amendments to Rule 1005 and eleven official forms previously considered by the Advisory Committee but withheld pending congressional action on bankruptcy reform legislation. Judge Small noted that Deputy Attorney General Larry D. Thompson had opposed publication of the privacy-related amendments at the Standing Committee meeting.

Judge Montali reported briefly on the January 2002 meeting of the Bankruptcy Committee. Of the matters currently before that committee, the one most likely to have an impact on the rules, he said, is the question of venue. Apart from the suggestion to amend the Bankruptcy Code to eliminate the state of incorporation as a basis for venue that has arisen from several quarters, he said, the Bankruptcy Committee is considering issues concerning the treatment of a case that is filed in an improper venue. Some of the questions are whether a bankruptcy judge can raise the question of venue sua sponte and whether a bankruptcy judge can

properly decide to retain a case filed in a wrong venue, once the question has been raised by a party.

Action Items

Proposed Amendments to Rules 1007, 2003, 2009, 2016, Proposed New Rule 7007.1, and Proposed Amendments to Official Forms 1, 5, and 17 Published for Comment August 2001. Professor Morris noted that the Committee had received only a few comments and that most of the comments had addressed the requirements in the proposed amendments to Rule 1007 and proposed new Rule 7007.1 to provide the court with financial disclosures that will assist a judge in determining whether the judge is disqualified from handling a case or proceeding. Two bankruptcy judges had commented that the required disclosures should be broader and include more types of entities than the proposed rules contemplate. Professor Morris said the Committee initially had discussed a draft with broader requirements. The other advisory committees, however, already had approved quite a narrow rule, and the Standing Committee had expressed a strong desire for consistency on the subject in all federal rules. Accordingly, he said, the only variations from the text adopted by the other advisory committees had involved use of "equity" (rather than "stock") interests and "governmental unit," as those are defined terms under § 101 of the Code. The only other subject addressed in the comments, he said, was a suggestion to delete from Official Form 1, the Voluntary Petition, the certificate by a non-attorney bankruptcy petition preparer in favor of the separate form for the purpose, Official Form 19. As Official Form 1 is being amended only to conform to legislation adding a "clearing bank" to the categories of entities that may file a petition, the suggestion was not germane.

A member asked whether the Rule 7007.1 should require members of a creditors committee to make disclosure. Professor Morris said the subject had been discussed but did not seem workable. A member suggested that it would be a good idea for the Committee Note to mention that the reason for not listing the debtor as a party to make disclosure under Rule 7007.1 is that the debtor is required to disclose the information at filing under the proposed amendment to Rule 1007. **A motion to forward to the Standing Committee the proposed amendments to Rules 1007, 2003, 2009, and 2016, and new Rule 7007.1, with the addition of a sentence to its Committee Note referencing the requirement in the proposed amendment to Rule 1007 for the debtor also to make disclosures, with a recommendation that the amendments and new rule be adopted, passed unanimously. A motion to forward the proposed amendments to the Official Forms with a request that their effective date be delayed to December 1, 2002, also passed without opposition.**

Proposed Amendments to Rule 1005 and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C,and 19 Published for Comment January 2002. Chairman Small announced that the hearing on the proposed amendments scheduled for April 12 had been canceled because no timely request to testify had been received. He observed that only three comments had been received, but that comments historically are filed close to the deadline, which for these proposals is April 22, 2002. A member noted that the comments received by CACM during the time it was

developing the policy adopted by the Judicial Conference in September 2001 had been balanced; advocates of full information available over the Internet and advocates for privacy both had contributed, with the Social Security number (SSN) the principal issue. Judge Walker said a member of CACM had told him that technology exists whereby court records can be searched either by name or by SSN. With this technology someone in possession of only an individual's name can search court records but will not learn the SSN, while someone in possession of an individual's nine-digit SSN can search the same database for a matching number. Such a system would enable a creditor having a person's SSN to determine whether that person had filed bankruptcy or, conversely, whether a specific bankruptcy debtor is the one who owes money to the creditor or simply has a similar name. A participant said the requirement to match a full SSN does not prevent identity theft, because a criminal-minded person can simply put in random nine-digit numbers until a name appears that the person wants to steal.

A member raised the matter of § 342(c) of the Code, which requires the debtor to provide the debtor's full SSN on any notice given by the debtor to a creditor, and another member suggested that the Judicial Conference policy seems to conflict with congressional policy as expressed in § 342(c). Judge Walker said CACM has submitted proposed amendments to the Bankruptcy Code to Congress and that his contact at CACM seems to believe that Congress will accede to the Judicial Conference on the issue of § 342(c). Chairman Small noted that the Judicial Conference policy is for the court to collect the full SSN, so it would be available to the trustee and other proper parties, but not to display it on the Internet. Mr. Sommer said that in 1994, when § 342(c) was enacted, there was no nationwide electronic access to bankruptcy court files. He said Congress now may hold the view that more protection of a debtor's SSN is needed and, therefore, be willing to amend the statute. He suggested that the SSN might be transmitted to the court in some way but not "filed," that it could be treated in the same way an attorney's login and password is handled under the electronic filing system. The court system uses the SSN to detect ineligible repeat filers. It also was suggested that some documents, such as summonses and § 341 Notices might include the SSN but be kept off the Internet by the court. Another member responded that every motion must be accompanied by a notice, which may result in many disclosures of SSN by a debtor and there could be practical problems for a court if these must be kept off the Internet.

Mr. Kohn said he is not comfortable with a simple "yes" or "no" vote on the published proposals and referred the Committee to the range of commentators and of comments submitted in response to CACM's proposals. Ms. Davis mentioned the new policy of the EOUST that requires each debtor to present a Social Security card together with some form of photo identification at the § 341 meeting as a means to combat fraud. She said the new requirement has produced about a one percent rate of mismatched SSNs when the trustee compares the SSN on the petition with the card presented at the meeting. Although some of the mismatches are typographical errors, she said, others are not. A member asked why the Committee should anticipate congressional policy and expressed concern about the idea that a debtor would submit a SSN that would be available only to the court and not to the creditors who also need it. He said he opposes the published proposal.

One participant in the meeting asked where the idea of truncating account numbers (in addition to SSNs) had originated, as such accounts likely are closed down and not useful to thieves. Others responded that the idea had originated in the Committee and that not all accounts are closed or useless, giving utility accounts as an example of the type that usually remain open. A member said that the Committee does not know whether four digits is enough, either for the SSN or for an account number. He said he doubted the Committee ever would know, although one reason for publishing the proposed amendments was to attempt to learn.

A member asked whether the Committee is bound by the Judicial Conference policy. Chairman Small said, although a Judicial Conference policy carries great weight with all committees, the Advisory Committee can decline to amend the rules and forms if it does not agree with the policy or believes it should not apply to the bankruptcy forms and rules. He added that he had told the Standing Committee that the Advisory Committee, although it had agreed to publish the proposed amendments, was not committed to conforming the rules and forms to the Judicial Conference policy. Judge Walker, who served as liaison from the Committee to CACM's privacy subcommittee starting in October 2001 said CACM expects the Committee to act to implement the policy, and act quickly, and said the Committee will be asked to explain any refusal to do so. He added that CACM expects Congress to amend § 107 of the Code to permit a bankruptcy judge to protect a filed document on privacy grounds and anticipates the development of a "privacy document" containing information that would be filed but not available over the Internet. Mr. Rabiej added that CACM also is working with the Department of Justice on a procedure for granting the Internal Revenue Service access to the full SSN. **A motion to refer the published amendments to the Subcommittee on Privacy and Public Access and directing the subcommittee to report at the next meeting passed without opposition.** Chairman Small suggested that the subcommittee should meet on April 12, the date formerly scheduled for a hearing on the proposed amendments, and invite representatives of interested entities for a "focus group" type of discussion on the published proposals. He suggested that representatives from CACM also could be invited, and **appointed Judge Walker and Mr. Shaffer as additional members of the subcommittee.**

Rule 2014. Chairman Small reviewed for the Committee the events of the summer of 2001 that led to the withdrawal of the Committee's proposed amendments from the package submitted to the September 2001 Judicial Conference. The Committee's proposed amendments had drawn two "no" votes and the June 2001 meeting of the Standing Committee, and two chief circuit judges who are members of the Judicial Conference's executive committee later had raised objections, thereby guaranteeing that the proposed amendments would be placed on the discussion calendar for the Judicial Conference where they possibly would have been defeated. Rather than risk the amendments' future, Chairman Small and Judge Anthony J. Scirica, chairman of the Standing Committee, had withdrawn the proposed amendments. One chief circuit judge, he said, opposes any change to the existing standard of disclosure, as the proposed amendments would establish a lower standard of disclosure, in that judge's opinion. The other chief circuit judge, he said, took issue with the proposed "catchall" disclosure of any interest, relationship, or connection that would lead the court or a party in interest reasonably to question

whether the professional seeking employment is disinterested in the case, apparently on the basis that such standard would substitute the professional's judgment for that of the judge. Mr. McCabe said he believed the judges who opposed the Committee's proposals want to retain the existing standard that the professional is required to disclose all "connections," no matter how trivial, and that the Judicial Conference would be uncomfortable with any standard that might appear to limit a judge's discretion. Other members commented that even good law firms violate the existing rule, with some stating in their applications that the firm performed a conflicts check on the largest 50 creditors in the case, admitting by implication that they did not go further. A member suggested routinely holding a hearing on an application for approval of employment 30 days after it was filed. Chairman Small said it could be dangerous to have a hearing when there is no issue, as the court then could appear to be blessing an arrangement that later proves to have been improper. Another member said the reported cases all arose from objections that were filed to fee applications and that one purpose of the proposed amendments would be to avoid allowing a firm to work for a year and not be paid. Others noted that using a hearing at the beginning of a case to create a "safe harbor" for professional would violate § 328(c) of the Bankruptcy Code, which authorizes the court to deny compensation to a professional if a conflict arises or is disclosed during the case, and that a professional takes the risk of such denial if the professional fails to make sufficient disclosure. One member commented that the Committee seemed to be facing a clear choice between bowing to political reality and making its point that the existing rule is not being complied with, and another said the risk of defeat looked so high that he would prefer the Committee to table the proposed amendments. **A motion to table the proposed amendments to Rule 2014 passed without opposition.**

Official Form 6 - Schedule G. The proposed amendments to Schedule G - Executory Contracts and Unexpired Leases were suggested as a means to provide notice of the bankruptcy case to those who are parties to executory contracts or unexpired leases with the debtor. One attendee commented that the proposed change might do more harm than good, because parties who are not owed any money might think they nevertheless need to file a proof of claim. Another said that in the context of intellectual property, especially computer software, nearly everyone is a licensee, and may not realize it or know either the identity or the address of the licensor. A member said a party to an executory contract with a debtor may have a "claim" under the broad definition of that term in the Bankruptcy Code but that the Committee probably does not need to amend the form to make it resemble a schedule of creditors. Another member said it might be sufficient to amend the existing instructions to delete the statement that entities listed will not receive notice of the bankruptcy case unless they also are listed on a schedule of creditors. The consensus was that the Committee could provide for giving notice to parties listed in Schedule G by amending Rules 1007 and 2002. **A motion not to adopt the proposed amended schedule passed without opposition.**

Rule 4003(c). The Reporter introduced the proposed amendment concerning the allocation of the burden of proof of any objection to a debtor's claimed exemptions , which was suggested by Bankruptcy Judge Barry Russell. Judge Russell stated, in a letter to the Committee, that the burden of proof under Rule 403 had been on the objecting party, as it is today under Rule

4003. The difference is that under § 522(l) of the Bankruptcy Code, claiming an item of property as exempt by the debtor makes it so, in the absence of objection by the trustee or other party in interest. Under the Bankruptcy Act of 1898, to which Rule 403 applied, the trustee filed a report of exempt property and the debtor could object. When the identity of the party filing an objection changed, there was a ripple effect that shifted the burden of proof to the trustee. Judge Klein said he understood Judge Russell to believe that Congress did not intend such a shift. Judge Russell, in his letter, cited *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 120 S.Ct. 1951 (2000), in which the Supreme Court ruled that the burden of proof for tax claims is governed by substantive nonbankruptcy law, as support for his view that a debtor who claims exemptions under state law should bear the burden of proof in the event an objection is filed. **The consensus was to defer the proposal until the law has developed further, in light of the *Raleigh* decision.**

Rule 4008. The proposed amendment would provide a deadline for the filing of a reaffirmation agreement. The proposal arose from a suggestion by the Bankruptcy Judges Advisory Group that the absence of a filing deadline is leading to agreements being filed after the case is closed or not being filed at all, especially in courts which close a case immediately after the entry of the debtor's discharge. In addition, under Rule 4008, if the debtor was not represented by an attorney, the court must hold a hearing within 30 days of granting the discharge. If the agreement is not filed, the court has no way to know a hearing needs to be scheduled, and the deadlines Rule 4008 provides for noticing and holding the hearing may pass. Under section 524(c)(6) of the Code, the agreement is not enforceable if no hearing is held. One problem with amending the rule as suggested, the Reporter said, is that in order to give notice and hold the hearing within the existing deadline of 30 days after the entry of the discharge order, the court would have only a six-day window in which to hear the matter. Chairman Small inquired whether late filing of reaffirmation agreements were a problem for the courts, and received varying responses from members, all of which indicated that any problems are minimal. Mr. Sommer recalled having raised the issue some years previously and said the Committee had been skeptical about the need for an amendment at that time. A member noted that the Code contains a deadline for making the agreement but not for filing it, and another member suggested that what is needed is a deadline for filing the agreement when the procedure for any hearing left up to each court. **A motion to re-draft the rule to provide a deadline for filing a reaffirmation agreement but not for any hearing that might be required was not opposed.** The Report presented a new draft on the second day of the meeting. The chairman said he would delete the provision requiring a debtor not represented by counsel to file a motion for approval of the agreement. If the debtor does not have an attorney, the court automatically schedules a hearing, he said. Mr. Sommer noted that the Bankruptcy Reform Act would require a motion and provides the text it must contain. Members commented that the rule should provide for the creditor to receive notice of the hearing. It also was pointed out that a filing deadline could have a punitive effect on the debtor if the debtor were to lose a car or other property because the agreement were not filed. A member suggested providing for the court to extend the time, and another said the rule should require the creditor to file the agreement, with no penalty to the debtor permitted in the event the creditor fails to do so. **The consensus was to refer the**

proposal to the Subcommittee on Consumer Issues.

Rule 5002. The Reporter introduced the discussion and referred to his memorandum to the committee concerning a suggestion that Rule 5002(a) on the appointment of relatives be amended to forbid employment of a law firm in which a relative of the judge is a partner or other owner, but permit the judge to approve the employment if the relative is an associate or non-equity partner. Such a change would conform the rule to "Committee on Codes of Conduct Advisory Opinion No. 58" which the Committee on Codes of Conduct has interpreted to forbid a judge to handle a case in a participating law firm has a partner or other owner who is a relative of a judge. If the relative does not have an ownership interest, recusal is not required. Members suggested, however, that it may not be advisable to base a rules amendment on an advisory opinion and recommended looking to the relevant canon of the Code of Conduct for United States Judges. Another member noted, however, that the Canon is concerned with recusal of a judge, while the rule is concerned with the eligibility of a private individual for appointment to perform professional services in a bankruptcy case, and that the Canon might not solve the actual problem presented. Another noted that even associates receive bonuses and thus have an "interest" because they share in the profits of the firm, and another suggested that many firms would not want to invest an entire summer in someone who could never make partner. It also was pointed out that there are statutory provisions limiting the appointing authority of judges, in particular, 18 U.S.C. § 1910, which makes it a crime for a judge to appoint a relative as trustee, and 28 U.S.C. § 458, which forbids the appointment as an employee any relative of any judge of that court. **A motion to defer the matter indefinitely was not opposed.**

Rule 2002(j). The Reporter explained that shortly before the meeting a member had called to his attention that fact that the rule requires that notice to the Internal Revenue Service (IRS) be sent to the "District Director," a position the IRS has abolished. In addition, an amendment to Rule 5003 which took effect in late 2000 requires the clerk to maintain a register of addresses of government entities for notice purposes. Replacing the obsolete job title now in the rule with a cross reference to the Rule 5003 would resolve the problem, he said, adding that Mr. Kohn had reported that such an amendment would be acceptable to both the IRS and the Department of Justice. As a technical amendment reflecting a structural change within the IRS, the Reporter said, publication of the amendment should not be required. **A motion to approve the amendment and recommend its adoption without publication passed unanimously.**

Information Items

Bankruptcy Abuse Prevention and Consumer Protection Act of 2001. The Committee discussed with its consultants and the Director and General Counsel of the EOUST the various provisions of the pending Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 and the amendments to the rules and forms, as well as the new forms, that would be required in the event of the bill's enactment.

Rule 2002(g). The Administrative Office's Bankruptcy Noticing Working Group had requested the Committee to consider amending Rule 2002(g) so that a creditor receiving notices electronically could change its address centrally, rather than having to do so through each court individually. As most volume noticing for all courts now is done centrally by a contractor to whom each court sends the information to be used, amending the rule as suggested would speed the updating of a creditor's address and be more efficient for the courts as well. Although noting that the suggestion appeared to be designed also to facilitate actual notice to creditors, members of the Committee raised several concerns. A member said the certificate of service should say if the notice was sent to the address requested by the creditor. Another member asked whether there would be a similar system for registering addresses for paper notices not sent through the noticing contractor, and noted that it is not unusual for a creditor to have multiple addresses, with different ones used for different purposes during a bankruptcy case. Another asked whether creditor addresses registered at a court, especially those filed later as requests or on proofs of claim, are transmitted to the noticing center. Mr. Waldron said newly filed addresses for a creditor are added to existing lists and that automated systems are used by the contractor to reconcile variations on each creditor's name and to match name variants with registered addresses. **The Chairman referred the suggestion to the Technology Subcommittee for further study.**

Suggestion for Amendment

Judge Klein suggested that Rule 7026 should be amended to allow exemption or selective opt-out from its requirements in the simpler adversaries and those involving low dollar amounts, such as student loan dischargeability actions filed by a debtor. A member said it might not be necessary to amend the rule, because the only sanction for noncompliance is that discovery is not available. The Chairman requested Judge Klein to compile a list of specific exceptions for the Committee to consider.

Next Meeting

The Committee discussed Longboat Key, FL, as a possible location for the spring 2003 meeting, with Seattle, WA, as a possible alternate. The Committee also agreed on March 27-28 or April 3-4 as acceptable dates, with the choice to be made based on when the better hotel rates can be obtained.

Respectfully submitted,

Patricia S. Ketchum

Memorandum

TO: Members of the Committee on Rules of Practice and Procedure

FROM: Anthony J. Scirica

RE: Progress Report
Local Rules Project

DATE: May 17, 2002

This document is intended to explain to you the progress of the Local Rules Project since our meeting in January 2002. The first portion of this Report explains briefly the past activities of the Project. The second portion consists of an explanation of what has occurred with respect to its completion since our meeting in Tucson, Arizona last January. The final portion of this document explains when this study is anticipated to be completed and how it will be used.

History of the Local Rules Project

The ninety-four federal district courts currently have an aggregate of approximately 5,575 local rules, not including many "sub-rules," appendices, and other local directives. This number, although large, is unrepresentative of the actual number of rules in some courts. For example, there are only nineteen rules in the District of Montana yet, when sub-rules, which are each discrete directives, are counted, there are eighty-six of them. There are only twenty-two local rules in the Eastern District of Wisconsin but, when the discrete sub-parts are counted, there are ninety-one rules. The Central District of California has only thirty-two local rules, but there are actually 254 discrete sub-rules. There are only thirteen rules in the District of Maryland but those directives comprise thirty-eight pages of text in the commonly used paper compilation of local rules.[1] There are only four rules in the Western District of Wisconsin but, as stated in the preliminary statement to its rules in electronic format, there are other directives that control.

> This court prepared a number of guides to assist you while your case is pending in this court. The court will provide printed copies of these guides when they are appropriate. The copies provided here are provided for your convenience.

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[1] *See* Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

> These guides will not cover all issues relating to cases in this court. If you are looking for information about issues that are not covered in these guides then you might try our local rules or the Federal Rules of Civil Procedure.[2]

There are only seven local rules in the Western District of Virginia but the paper compilation of the local rules also sets forth thirty-four standing orders that regulate conduct.

In approximately 1988, the Local Rules Project estimated that there were 5,000 local rules, not including other local directives. There has clearly been an increase in the actual number of local rules since that time.

Although the precise number of pages of local rules was not counted or even estimated in 1988, the volume of local rules seems to have increased significantly over the past thirteen years. Regardless of whether there has been an increase, the volume of local rules is staggering. Some examples of the volume of these rules may be illustrative.[3] The rules in the District of Kansas comprise sixty-two pages of text. The rules in the Northern District of Mississippi comprise 107 pages. The rules in the District of Massachusetts comprise 122 pages. The Northern District of California has ninety pages of text devoted to civil local rules. All of the local rules of the district courts fill five 3" wide binders almost completely.

These rules are extraordinarily diverse. They cover the entire spectrum of federal practice, from attorney admission and attorney discipline, through the various stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

As you are aware, the issue of local rulemaking has been a subject of concern for many years for practitioners throughout the country, the judiciary, and the Congress. Congress passed the new Rules Enabling Act November 19, 1988 as Title IV of the Judicial Improvements and Access to Justice Act, effective December 1, 1988.[4] It sought to provide "greater participation by all segments of the bench and bar" in the rulemaking process. [5] While Congress was working to pass the Rules Enabling Act, the Judicial Conference, through the federal rulemaking process, was amending Rule 83 of the Federal Rules of Civil

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[2] Western District of Wisconsin, electronic discussion entitled: "Guides and Procedures."

[3] All of these numbers are determined from the Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

[4] Pub. L. No. 100-702, §§401-407, 102 Stat. 4642, 4648-4652 (1988).

[5] H.R.Rep. 422, 99th Cong. 2d Sess. 4 (1985).

Procedure, effective August 1, 1985 to provide more public awareness of local rules and the rulemaking process.[6]

In 1985, the Judicial Conference also authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules. The Local Rules Project was fully operational beginning in the fall of 1986. The *Report of the Local Rules Project: Local Rules on Civil Practice* was distributed to the chief judges of the district courts in April of 1989. The *Report of the Local Rules Project: Local Rules on Appellate Practice* was distributed in the following year to the chief judges of the courts of appeals. The *Report on the Local Rules of Criminal Practice* was distributed to the chief judges of the district courts in April of 1996. These documents were provided to the courts as suggestions for the courts to use when reviewing and renumbering their local rules.

When the Local Rules Project began, there was no uniform numbering system for federal district court local rules. The Local Rules Project proposed a uniform numbering system that was endorsed by the Standing Committee and Judicial Conference in 1988.[7] The system was explained to the district courts in the original *Report*. During this time, the Advisory Committees were working through the rulemaking process to amend the Federal Rules to require uniform numbering of local rules. Amendments to the Federal Rules of Civil Procedure took effect December 1, 1995. The Judicial Conference set April 15, 1997 as the date of compliance with this numbering system.[8]

Since that time, the Judicial Conference, the individual courts and judicial councils, and the Congress have been concerned in various ways with local rules and rulemaking. For example, after the circulation of the Project's Reports, the Advisory Committees examined rule topics set out in those reports that may more appropriately be addressed by federal rulemaking with a view toward possible amendment of the Federal Rules. [9] *The Long Range Plan for the Federal Courts* recommended that Federal Rules be adopted as needed "to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation."[10] One of the Implementation Strategies for the Recommendation stresses that the "national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."[11] In addition, each circuit council has developed its own procedure for reviewing new and amended local rules to determine whether they should be modified or abrogated.

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6 Fed.R.Civ.P. 83. Rule 57 of the Federal Rules of Criminal Procedure was amended at the same time to correspond to the changes made in Rule 83. See Fed.R.Crim.P. 57.

7 Report of the Judicial Conference (Sept., 1988) 103.

8 Report of the Judicial Conference (March, 1996) 34-35.

9 *See, e.g.,* Fed.R.Civ.P. 4, 5, 24, 38, 53, and the discovery rules.

10 Long Range Plan for the Federal Courts, Recommendation 28, p. 58.

11 *Id.* at Implementation Strategy 28c, p. 58.

The Civil Justice Reform Act of 1990[12] was enacted by Congress to investigate the causes of expense and delay in litigation in the federal courts. Pursuant to the Act, the courts had an opportunity to review and evaluate many pretrial and trial activities, resulting in changes and additions to the local rules and eventual amendments to the Federal Rules.

Lastly, the American Bar Association has also demonstrated concern about the proliferation of local rules. The Litigation Section of the American Bar Association created a Federal Practice Task Force, which developed the "Report and Recommendation on Local Rules." The House of Delegates of the American Bar Association adopted the Section's Report at its winter 2000 meeting.[13] The recommendations in that Report essentially sought more easily accessible local rules, uniformly numbered local rules, and case-specific orders rather than local rules.[14]

Current Activities of the Local Rules Project

The Final Report

As you are aware, Mary P. Squiers submitted a Report at our January meeting consisting of a portion of the full report for our review and discussion. This Report consisted of an evaluation of the local rules on various topics. The local rules are being analyzed using five broad questions. (1) Do the local rules repeat existing law? (2) Do the local rules conflict with existing law? (3) Should the local rules form the basis of a Model Local Rule for all of the jurisdictions to consider adopting? (4) Should the local rules remain subject to local variation? And, (5) Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Civil Procedure?

The discussion at our meeting in January further refined what the final Report would contain. Specifically, we decided on some policies and changes that have been, and continue to be, incorporated into the final project. For example, the Model Local Rules are being removed from the final report and no further Model Local Rules will be developed. The Project Report will continue to highlight those rule topics that generate many local rules since such proliferation may indicate a need for national attention. There will be individual commentary provided to each district of inconsistent and duplicative local rules. The issue of what is an inconsistent local rule will be addressed in the final report. Clear inconsistent rules will be identified and then, as a separate category, possible inconsistencies will be highlighted. Lastly, the Report is identifying out-moded local rules that should definitely be rescinded.

12 Pub. L. No. 101-650, Title I, 104 Stat. 5089-98 (codified in part at 28 U.S.C. § 471-482 (1994)).

13 Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

14 *Id.*

Uniform Numbering Of Local Rules

During the initial activity of the Local Rules Project, this Committee noted that there was no uniform numbering system for federal district court local rules relating to civil practice. There are many advantages of such a system, *e.g.*, to help the bar in locating rules applicable to a particular subject and to ease the incorporation of local rules into indexing services and computer services. These advantages become even more important as we all rely more heavily on computer-assisted research. Accordingly, the Conference approved and urged each district court to adopt a uniform numbering system for its local rules addressing civil practice, patterned upon the Federal Rules of Civil Procedure, at its September 1988 meeting. Report of the Judicial Conference, 103 (Sept. 1988).

Amendments were made to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, effective December 1, 1995, which provide that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference." (*See* Fed.R.App.P. 47, Fed.R.Civ.P. 83, Fed.R.Crim.P. 57, and Fed.R.Bank.P. 8018 and 9029). On March 12, 1996, the Judicial Conference approved the recommendation of this Committee to adopt a local rule numbering system that corresponds to the local rules' respective Federal Rules. The Judicial Conference also set April 15, 1997 as the date of compliance with these numbering systems.

In addition to a uniform numbering system, another aid in locating individual court rules is their availability on the Internet. The Judicial Conference approved the recommendation of the Committee on Court Administration and Case Management that the courts be encouraged to post their local rules on internet websites, which would then be linked to the judiciary's external website. Report of the Judicial Conference (Sept. 2000).

As of April 2002, eighty-one of the ninety-four courts had local rules that were numbered in compliance with the prescribed uniform numbering system. Thirteen courts had not yet renumbered.[15] All of the district courts, with the exception of one court[16], had made their respective local rules accessible electronically so practitioners could find current local rules on the Internet. I sent out letters to each of the thirteen courts that had yet to renumber, reminding them of their responsibility to do so and offering the assistance of Mary Squiers, if needed. I plan to call each of them to discuss how their renumbering is proceeding.

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[15] *See* local rules of District of Arizona, Eastern District of California, District of Connecticut, Middle District of Florida, District of Maryland, Eastern District of Missouri, Eastern District of North Carolina, District of Puerto Rico, District of Rhode Island, Middle District of Tennessee, Western District of Virginia, Northern District of West Virginia, and Southern District of West Virginia.

[16] District of Rhode Island. I am informed that the local rules in this district court are being reviewed at present and should soon be available on the web.

Future Activities of the Local Rules Project

There are several activities that must be accomplished to complete the work of the Project with respect to the civil local rules. First, we will continue to monitor the courts that have not renumbered their rules to achieve one hundred per cent compliance. Second, the actual Final Report must be completed. Mary Squiers intends to submit the Final Report to this Committee at its January 2003 meeting. Lastly, the implementation phase will begin. This will occur in the winter and spring of 2003 when letters and documentation are sent to the individual district courts explaining potential inconsistencies and problems with the local rules.

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

May 16, 2002

MEMORANDUM TO THE STANDING RULES COMMITTEE

FROM: Sidney A. Fitzwater, Chair
Subcommittee on Technology

SUBJECT: *Status Report*

The Subcommittee on Technology continues to monitor and participate in Judicial Conference initiatives on technological matters.

The Subcommittee reviewed the proposed model rules for electronic case filing (ECF) in criminal cases prepared by Judge John Koeltl, chair of the Committee on Court Administration and Case Management's Subcommittee on Electronic Filing. The proposed ECF criminal rules were adapted from the Judicial Conference-approved ECF model local rules for civil cases, which were drafted by Professor Dan Capra and Nancy Miller. The proposed rules for criminal cases will be distributed, not as model local rules, but as preliminary guidelines to courts that are beginning to accept electronic filing of criminal cases. It is anticipated that ECF model local rules for criminal cases will be prepared for Judicial Conference consideration after there has been sufficient experience with electronic filing of criminal cases. The Subcommittee on Technology expressed its concern that electronic filing in criminal cases created special issues that might require significant amendments to the proposed preliminary guidelines. The Subcommittee forwarded its concerns to the Criminal Rules Committee, which will be providing comments and suggestions directly to Judge Koeltl.

The Subcommittee on Technology also continues to review proposals to the national rules that may be necessary to accommodate technological changes.

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

John

May 17, 2002

Honorable John G. Koeltl
United States District Court
1030 Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Dear Judge Koeltl:

Thank you for the opportunity to review the draft preliminary guidelines governing the electronic filing of criminal cases. The guidelines are based on the model local rules governing electronic filing of civil cases, which were approved by the Judicial Conference last September. The Advisory Committee on Criminal Rules reviewed the guidelines and comments of the Standing Rules Committee's Technology Subcommittee at its April 25-26, 2002, meeting.

The advisory committee believes that the preliminary guidelines are useful and will help those courts beginning to use electronic filing in criminal cases. We have a few suggestions. The committee recognized that the draft preliminary guidelines were prepared without the benefit of any experience with electronic filing of criminal cases, which was so valuable in developing model local rules governing electronic filing of civil cases. Absent reliable experience or firm case-law authority, the committee believes that all "charging" documents, including a complaint and superseding indictment, in addition to an information and indictment, should be filed and retained in their original hard-copy form or in a scanned format, at the court's discretion.

Under the model electronic filing local rules in a civil case, the attorney's "log-in and password required to submit a document to the electronic filing system (along with a 's/' notation and typed name) serves as the (attorney's) signature on all electronic documents filed with the court." But as noted by Judge Fitzwater, chair of the Standing Committee's Technology Subcommittee, "the role of the attorney in a criminal case is somewhat different (than one in a civil case) in that the attorney cannot in some instances bind the client...." Several critical documents in a criminal case must be signed by the defendant, e.g., plea agreement, waiver of rights, etc. The difference underscores the importance of the defendant's signature and the possibility of subsequent litigation challenging its genuineness. Under these conditions, the committee was reluctant to approve anything less than the filing of a hard-copy or a scanned image of every document containing the actual defendant's signature in a criminal case.

Accordingly, the committee believes that every document signed by a defendant should be filed and retained in the original hard-copy form or in a scanned format, at the court's discretion.

The advisory committee also agrees with the suggestion of the Standing Committee's Technology Subcommittee that courts considering promulgating local rules governing electronic filing of criminal cases be advised to adopt such rules separate from any local rules governing electronic filing of civil cases. Separate local rules will facilitate "uniform numbering" mandated by the Federal Rules of Practice and Procedure.

The experience of those courts accepting electronic filing in criminal cases will undoubtedly provide us with a better appreciation of the issues arising from electronic filings. We look forward to continuing to work with your committee during the next stage in developing model local rules. Please call me if you would like to talk about any of this with me.

Sincerely yours,

Ed Carnes

cc: Honorable Anthony J. Scirica
Honorable John W. Lungstrum
Honorable Sidney A. Fitzwater
Professor Daniel J. Capra
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary

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CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

March 29, 2002

MEMORANDUM TO JUDGE EDWARD CARNES

SUBJECT: *Electronic Filing of Criminal Cases*

The Standing Committee's Subcommittee on Technology has been asked to review and comment on revisions that Judge John Koeltl (S.D.N.Y.) has made to the draft Model Local District Court Rules for Electronic Case Filing to address electronic filing in criminal cases. We have also been asked to send our comments to the Criminal Rules Advisory Committee. Judge Koeltl has led the work on the model local electronic filing rules for the Committee on Court Administration and Case Management. We hope you will find these comments helpful in reaching your own conclusions about any suggestions that should be sent from your committee to Judge Koeltl.

Judge Koeltl is recommending that the model local rules, as revised, be restyled as preliminary guidelines and made available to those courts that are preparing to accept electronic filing of criminal cases. It is contemplated that a formal set of model local rules will be prepared and submitted to the Judicial Conference for its approval after sufficient experience with criminal case electronic filings has been acquired. We suggest, at a general level of review, that courts now planning to prescribe local rules governing electronic filing in criminal cases be advised that such rules be adopted as a separate set of rules rather than be combined with civil rules. This will facilitate the "uniform numbering" that is required by national rule, and it will also make it easier to tailor the rules to address issues that are particular to criminal cases.

Judge Koeltl's draft uses the civil model rules as a starting point. Although the model rules appear well-suited for most civil cases, we think your committee may wish to consider other rule issues that are more pertinent to criminal cases but that are not necessarily made apparent when the civil rules are used as a foundational structure. One issue we have identified relates to treatment of signatures on electronic documents. The model local rules were developed for use in civil cases; they provide that electronically filed documents signed by someone other than the attorney filing the document (*e.g.*, an affidavit) should use a notation (such as "/s/") to indicate that the original was signed, and a signed paper copy is to be kept by the filing attorney for some designated period of time (Model Rules 7, 8). Because the role of the attorney in a criminal case is somewhat different in that the attorney cannot in some instances bind the client

based on the attorney's signature alone, there are likely to be more documents signed by non-attorneys (*e.g.*, defendants) filed in criminal proceedings. There may be greater concerns about retention of documents by counsel in criminal cases. And, there may be a greater likelihood that the signature could become an issue in collateral proceedings. We feel the issue of how signatures of non-attorneys on electronically filed documents in criminal cases should be handled warrants additional consideration.

There may be other issues that will require modifications to the proposed electronic filing rules for criminal cases, and the expertise and input of your committee will provide valuable assistance in that process.

If you have any questions concerning these comments, please do not hesitate to contact me.

Sidney A. Fitzwater

cc: Honorable Anthony J. Scirica
Professor Daniel J. Capra
Peter G. McCabe, Secretary

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 23, 2002

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Long-Range Planning Information*

Attached are informational items prepared by the Administrative Office's Long Range Planning Office.

The first item is a March 2002 report prepared by the Long Range Planning Office that identifies vital long-range planning issues that pertain to the various Judicial Conference Committees. (The long-range planning issues for the Standing Committee are set forth on page 6.) The second item is a summary report of the Long-Range Planning Meeting that was held in Washington, D.C. on March 12, 2002. The meeting, which was attended by the chairs of 13 Judicial Conference Committees and several members of the Conference's Executive Committee, focused on identifying and addressing the crucial long-range issues facing the Federal Judiciary. The last item is a memorandum from Judge Charles R. Butler, Jr., the long-range planning coordinator for the Conference's Executive Committee, seeking input from all chief judges on long-range planning issues.

John K. Rabiej

Attachments

AGENDA # _____
Summer 2002

Long-Range Planning (Information)

An updated list of strategic planning issues and a report of the March 2002 long-range planning meeting are attached. The meeting focused on crosscutting strategic issues identified by several committees related to security and emergency preparedness, planning for the impact of technology, and preparing for the possibility that the judiciary may face greater budget challenges in the coming years.

In response to an assessment of future budget pressures presented by Chief Judge John G. Heyburn II, Budget Committee chair, the group agreed that it is important for all committees to continue to focus on identifying possible future savings opportunities and, for committees with budget responsibilities, to ensure that budget requests are based on clearly articulated needs.

Each committee with budget planning responsibility was asked by Judge Heyburn in his January budget guidance letter to identify and "challenge fundamental assumptions about the resources truly necessary to do the job." The committee chairs discussed ways in which committees might approach this task, including the following suggestions:

- Identify the major building blocks of the committee's budget, i.e., what is most of the money spent on?
- Assess whether program expenditures reflect the most important program objectives
- Ascertain the key factors that drive costs up or down
- Consider whether formulas or other budget methods are based on true program-based needs as well as on reasonable cost assumptions
- Think about future developments that might change program needs or resource requirements
- Identify likely opportunities for future savings and productivity or other efficiency gains
- Identify areas for which resource needs are most likely to grow

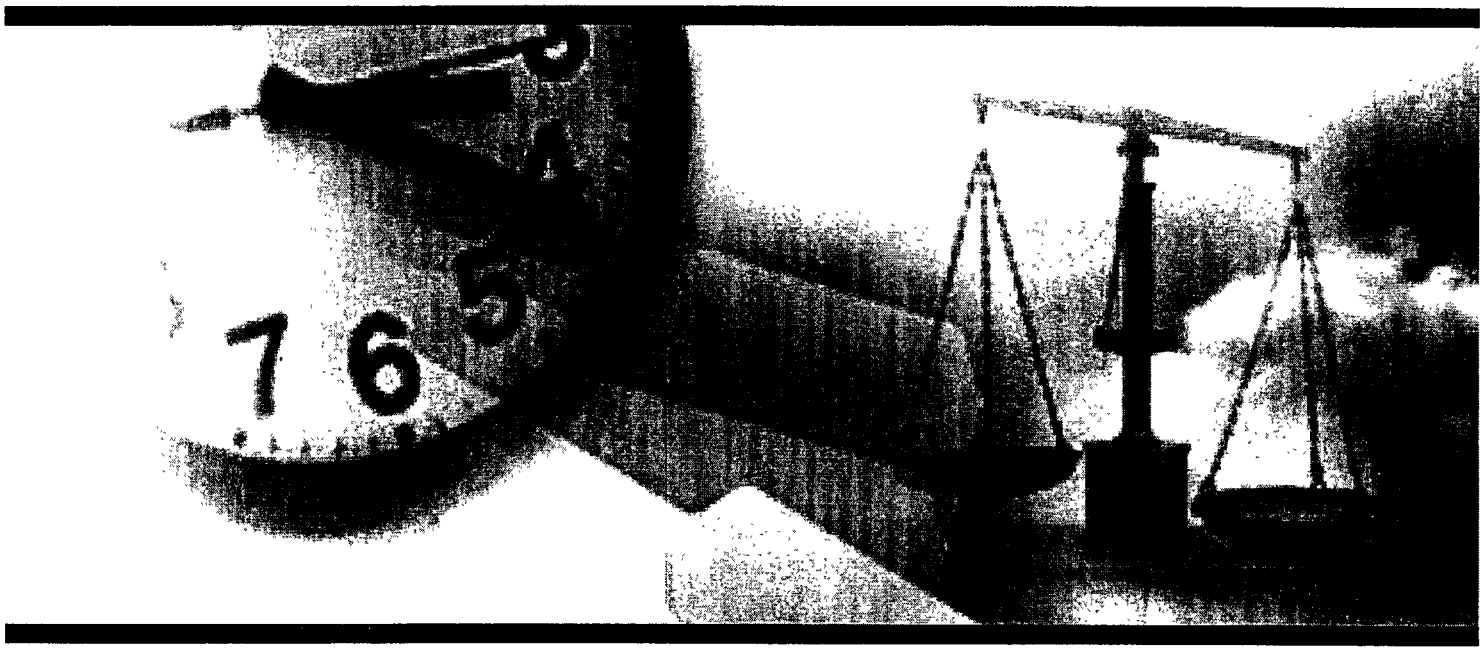
Also at the meeting, Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management, proposed seeking input from all chief judges on planning

issues. There was broad support for this proposal and it was suggested that Chief Judge Butler, as the planning coordinator, send a letter on behalf of all the committees involved in planning. The letter was mentioned at a conference of district court chief judges by Chief Judges Butler and Lungstrum and was sent to all chief judges on April 16, 2002. The letter (see Attachment 3) asked for general ideas on planning issues, as well as suggestions for particular committees. Suggestions pertinent to specific committees will be forwarded to them.

Attachment 1: Strategic Planning Issues of the Committees of the Judicial Conference of the United States

Attachment 2: Report of the Chairs' Long-Range Planning Meeting March 12, 2002

Attachment 3: Letter to all Chief Judges, United States Courts.



Strategic Planning Issues of the Committees of the Judicial Conference of the United States

March 2002

Administrative Office of the U.S. Courts
Long Range Planning Office

Key Crosscutting Strategic Issues

- Preserving the quality of justice and the excellence of judicial services
- Coping with changing work and increasing workload
- Preparing for future challenges to the judiciary's ability to obtain needed resources
- Managing resources effectively
- Maintaining effective judicial governance and management mechanisms
- Making effective use of technology and information and planning for the impact of technology
- Preserving judicial independence and maintaining effective external communications and relationships
- Attracting and retaining a highly competent workforce
- Addressing security and anti-terrorism issues and concerns

Committee Strategic Issues

Committee on the Administrative Office

- The importance of addressing security concerns and assisting courts with emergency planning.
- The changing methods of communicating information to the courts, particularly the increased use of electronic forms of communication.
- The need to work with the Judicial Conference committees and the courts to prepare for possible future budget pressures.
- The importance of enhancing oversight and internal controls to protect judiciary resources.
- Maintaining excellent service by the AO to the courts.
- Attracting and maintaining an excellent workforce.
- Ensuring effective allocation of resources.

Committee on the Administration of the Bankruptcy System

- Continuity of operations in the event of a disaster.
- Security of bankruptcy proceedings (including such activities as meetings of creditors that take place away from the courthouse) and the effect of increased security on the operation of the courts.
- Mitigation of the impact on the quality of justice in the event that the judiciary's budget is not increased, or is actually decreased, in the future.
- Flexibility in the deployment of judge resources in light of the volatility of bankruptcy case filings.
- Considering the potential impact of pending bankruptcy reform legislation.
- Obtaining additional bankruptcy judgeships.
- Meeting the need for more statistical information on the bankruptcy system.
- Managing changes in bankruptcy judges' work due to the advent of electronic case files in the bankruptcy courts.

Committee on the Budget

- The possibility of serious budget constraints, given the likelihood that the historical growth rates that the judiciary's budget has seen in the recent past are not likely to be sustainable in the coming years.
- Security concerns and their impact on future budgets, especially in view of terrorism.
- Improving compensation for judges.

Committee on Court Administration and Case Management

- Security concerns and their impact on court administration.
- Implementation of the Judicial Conference policy on privacy and public access to electronic case files.
- Changing nature of litigation in the federal courts.
- Increased need for case management assistance to reduce the time for case disposition.
- The development of model procedures and local rules, in conjunction with the Committee on Rules of Practice and Procedure, to govern electronic filing.
- The impact on the operation of clerks' offices of increased electronic filing and docketing.

Committee on Criminal Law

- Impact of the increased workload associated with supervision violation proceedings.
- Impact of the probation office staffing formula on future budget needs.
- Understanding the future needs of the probation and pretrial services system.

Committee on Defender Services

- Availability and quality of Criminal Justice Act services.
- Impact of technology on Criminal Justice Act services.
- Developing and sustaining a diverse workforce for the future.
- Maintaining the independence of the defense function.
- Death penalty representation under the Criminal Justice Act and related statutes.
- Learning from and assisting other appointed counsel systems - the concept of the right to counsel in democracies.
- Adequacy of panel attorney rates.
- Management of ninth circuit capital habeas costs.
- Optimum utilization of defender services funds.

Committee on Federal-State Jurisdiction

- Guarding against expansion of federal jurisdiction that would be inconsistent with principles of judicial federalism.
- Identifying problem areas in federal jurisdiction that could be addressed through legislation.
- Fostering communication between state and federal judiciaries.

Committee on Information Technology

- Use of technology to streamline, improve, and speed up processes in the judiciary.
- Maintaining stable and responsive national IT systems that are reliable and continuously available.
- Providing appropriate electronic access to information to all users who do business with the courts and the public at large.
- Providing IT training and support that is responsive to customer needs.
- Employing a uniform enterprise-wide technology architecture.

- Upgrading the IT infrastructure to ensure that it has adequate security safeguards.
- Upgrading IT applications to increase efficiency and effectiveness of the judiciary's core processes.

Committee on the Judicial Branch

- Increasing judicial compensation to continue to ensure quality of justice.
- Identifying other matters of welfare to judges including enhanced benefits.
- Ensuring that the judiciary has a strong public image.

Committee on Judicial Resources

- Preparing for budget constraints: controlling personnel costs and improving productivity.
- Remaining competitive as an employer.
- Understanding the workforce implications of new systems and changing technologies.

Committee on the Administration of the Magistrate Judges System

- Appropriate limits on magistrate judge numbers and authority.
- Roles of magistrate judges in court governance.
- Appropriate chambers staffing for magistrate judges.
- Contributions of magistrate judges to the quality of justice.
- The evaluation of full, fair, and effective utilization of magistrate judges.
- Helping courts obtain the greatest benefit from their magistrate judges.

Committee on Security and Facilities

- Planning for security resources effectively:
  - Immediate security needs of the courts.
  - Balance in security needs and using resources effectively.
  - The judiciary's relationship with United States Marshals Service.
- Planning comprehensively for housing the federal courts.
- Dealing with GSA restructuring and downsizing.
- Assessing the impact of technology on the security and facilities programs.

Committee on Rules of Practice and Procedure

- Restyling of the rules for consistency and readability.
- Impact of technology on rules.
- Analyzing local rules of court for consistency with national rules.
- Upholding the integrity of the rules process.
- Seeking greater participation in the rulemaking process by bench, bar, and public.

Judicial Conference Committee Chairs Long-Range Planning Meeting

March 12, 2002

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
MARCH 2002 LONG-RANGE PLANNING MEETING

The March 12, 2002 Long-Range Planning Meeting was held in Washington, D.C. It was facilitated by Chief Judge Charles R. Butler, Jr., a member of the Judicial Conference's Executive Committee who coordinates long-range planning meetings. The meeting was attended by the chairs of 13 Judicial Conference committees and by several members of the Executive Committee. Also in attendance were: Administrative Office Associate Director Clarence A. Lee, Jr.; Deputy Associate Director Cathy A. McCarthy, who provides principal staff support for the integrated long-range planning process; and other Administrative Office staff. A list of participants is included as Appendix A.

Crosscutting Strategic Issues

The committee-based long-range planning process in the federal judiciary includes an ongoing effort to identify and address strategic issues. At their winter 2001 meetings, committees reviewed the strategic issues that they had previously identified. New issues were added, and others were removed. An updated list of strategic issues appears in Appendix B.

The committees identified several issues that spanned the jurisdictions of individual Judicial Conference committees, three of which were the focus for this planning meeting:

- Challenges to the judiciary's ability to obtain needed resources
- Security and anti-terrorism issues
- Understanding and planning for the impact of technology

Challenges to the Judiciary's Ability to Obtain Needed Resources

The questions addressed under this topic included:

- *How well do you think we are prepared to justify our budget requests if Congress were to challenge them?*
- *What can we do to assure Congress that our budget requests are based on clearly-articulated needs?*
- *How can committees challenge their fundamental assumptions about the resources truly necessary to do the job? What realistic criteria or types of questions should committees consider?*

Deputy Associate Director Cathy A. McCarthy and James Baugher, Budget Division, delivered a presentation about the composition of the judiciary's budget and the anticipated growth in the judiciary's budget requirements. Over half of the judiciary's budget is spent on personnel, with the staffing requirements defined by formulas, and much of the rest is driven by other formulas related to personnel, workload, new facilities, and increased security costs.

The judiciary's costs are projected to increase at an average rate of close to 7 percent per year over the next five years. Funding requirements to maintain the existing workforce, including cost-of-labor adjustments, in-grade increases, and benefits, account for much of the projected increase. Because Congress does not typically fund the judiciary's full request, in order to fund fully the staffing and other formulas, and to "recapture" the funding not provided in the previous year, the percentage increase requested each year is not 7 percent, but is somewhere between 10-14 percent.

Chief Judge John G. Heyburn II, chair of the Committee on the Budget, noted that in the current and future budget climate, he thinks it is unlikely that the judiciary will be able to receive budget increases of 10-14 percent. He encouraged committees to reexamine their mechanisms for estimating budget needs and assess fundamental assumptions about how to formulate budget requests. He urged them to take a close look at what their program needs are -- especially those that bear considerable costs -- and to think about where there may be opportunities to identify productivity or other efficiency gains. He suggested committees ask themselves these questions: *If we seem to do fine each year with the reduced amounts Congress gives us, are we asking for too much? Have we thought through our requirements and are we confident that we are requesting, and can justify, only what we truly need?*

The planning group discussed ways in which committees might address these questions, including the following suggestions:

- Identify the major building blocks of the committee's budget, i.e., what is most of the money spent on
- Assess whether program expenditures reflect the most important program objectives
- Ascertain the key factors that drive costs up or down
- Consider whether formulas or other budget methods are based on true program-based needs as well as on reasonable cost assumptions

- Think about future developments that might change program needs or resource requirements

- Identify likely opportunities for future savings and productivity or other efficiency gains

- Identify areas for which resource needs are most likely to grow

Judge Heyburn stated that nearly every committee has engaged in this type of exercise, citing examinations of facilities, security, and lawbooks as examples. Judge Heyburn also noted the increases in funding for defender services that resulted from an examination of hourly rates of panel attorneys, which demonstrates that increases as well as decreases can be the result of fundamental re-examinations of program needs.

Judge William W. Wilkins, chair of the Committee on Criminal Law, reported that the Committee is examining the programmatic implications of a key element of the staffing formula for probation offices. The number of probation positions is largely driven by the number of persons under supervision on a particular date each year. This approach may be creating a disincentive for terminating deserving individuals early from supervision. The Committee will be discussing this issue in May.

Judge Dennis Jacobs, chair of the Judicial Resources Committee, pointed out that because personnel spending is a big part of the budget, finding ways to do more work without more staff or the same work with fewer staff or less costly staff can reduce future costs. He noted that it is important for the Committee and the courts to explore where work processes can be made more efficient through the effective use of technologies, procedural changes, training, and other methods. In the past, he noted, staffing formulas have been based on average needs, not on measuring the most efficient practices. A key challenge will be to ascertain how efficient methods and processes can be incorporated into staffing formulae.

Judge Michael J. Melloy, chair of the Committee on the Administration of the Bankruptcy System, reported that the Committee has a pending project to review the method for requesting additional bankruptcy judges that reflects the cyclical and volatile nature of bankruptcy filings. It is hoped that this will result in a new formula to better reflect differences among case types. For example, judges and staff, to different degrees, can handle a large number of additional Chapter 7 filings without a great deal of additional resources. This is not true for Chapter 11 filings.

Security and Anti-Terrorism Issues and Concerns

The questions addressed under this topic included:

- *How can the judiciary balance security concerns against resource limitations and other priorities?*
- *What are the security relationships and coordination needs between the judicial and executive branches?*
- *Should we be looking for additional ways to reduce reliance on the mail system?*
- *Do we need to be more vigilant about protecting our systems and records and checking the backgrounds of people hired by the courts?*
- *How will the Administration's policies and decisions affect workload in the federal courts? How can the federal courts respond to increased workload and resource demands in particular districts?*
- *Are there implications for federal-state jurisdiction?*

Judge Jane R. Roth, chair of the Committee on Security and Facilities, described her committee's efforts to balance emergency preparedness needs and security concerns against resource limitations. Judge Roth noted that many security-related issues have no easy answers. *How much security is too much? Can we hold court in fortresses – what about the Constitution's guarantees regarding public trials? What should the judiciary do if the executive branch fails to provide needed security for the judiciary?*

The committee's work has been based on the assumption that the judiciary will continue to operate in an environment that is increasingly hostile. The program is complicated by the inter-branch dependencies that exist for meeting the courts' security needs. The findings of an independent court security study completed in November 2001 will be useful in moving forward.

Judge Edwin L. Nelson, chair of the Information Technology Committee, noted that there are security risks beyond physical security of judges and courthouses related to electronic security. This involves guarding the judiciary's networks against cyber-terrorists and protecting the confidentiality of court records and communications. He mentioned that all judicial employees should be trained to sharpen their electronic security practices. He spoke of the value of conducting background checks for systems staff. (At its June 2002 meeting, the Committee on Judicial Resources will consider whether to recommend the use of background investigations and checks in the federal

courts.[1]) Judge Nelson also advised encryption of sensitive e-mail communications, which is easy to do using Lotus Notes.

Judge Lourdes G. Baird, chair of the Committee on the Administrative Office, reported on what the AO has done in response to recent security threats. Following the anthrax contamination in Washington, the AO put in place national contracts for anthrax screening and consultation which courts could employ, and it offered assistance on continuity-of-operations planning. The Administrative Office ceased most paper mail to the courts and expanded the use of the e-mail broadcast system to reach all judges and court managers. The Committee has requested a study of communication requirements, practices, and methods to identify needs and opportunities for improvement.

Judge Frederick P. Stamp, Jr., chair of the Committee on Federal-State Jurisdiction, reported on recent Executive Branch and legislative initiatives, proposed or enacted in response to the terrorist attacks of September 11, 2001. First, Judge Stamp noted that President Bush issued an order establishing military commissions to try certain non-United States citizens involved in terrorist activities. The Department of Defense is charged with promulgating rules and regulations to govern procedures of these commissions. Judge Stamp noted that as proposed by the Executive Branch, there is no Article III review of the proceedings. However, some members of Congress have introduced legislation that would provide some Article III appellate review.

Second, Congress passed the Air Transportation Safety and System Stabilization Act. This new law establishes within the Department of Justice a victim compensation fund for persons injured or killed on September 11th. Victims do not have to prove negligence or any other theory of liability, and a Special Master determines the amount of compensation to be awarded. Such awards are not subject to judicial review, and claimants pursuing this administrative route waive the right to file a civil action in court. The new law also creates a new federal cause of action to govern claims arising from the events of September 11th for those claimants who prefer a judicial forum. Such cases are to be within the exclusive jurisdiction of the Southern District of New York. Judge Stamp noted that this law may set a precedent for how Congress responds to future terrorists attacks.

Third, Judge Stamp noted that legislation is now pending in Congress that would provide federal funds as a backstop to ensure the continued availability of commercial property and casualty insurance and reinsurance for terrorism-related risks. Some such

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[1] Currently, Judicial Conference policy requires background investigations for only a limited number of staff positions. It also authorizes courts, on a limited basis, to request a records check when appointing or promoting an employee to a sensitive position.

bills would also create a new federal cause of action for personal injury and property damage arising out of future terrorist attacks, preempting state causes of action. In addition, such cases would be heard by a federal court or courts designated by the Judicial Panel on Multidistrict Litigation. Judge Stamp noted that this will certainly affect the allocation of jurisdiction between the federal and state judiciaries.

Planning for the Impact of Technology

The questions addressed under this topic included:

- *How much can we realistically plan in advance for dealing with technological change?*
- *What types of information would committees find most useful in considering technological impacts, and how can we produce and share that information?*
- *Can we anticipate staffing impacts, or do we need to wait until we see how technology changes the work?*
- *To take full advantage of electronic case files, should we be thinking about the possibilities for new ways of handling the work that is not tied to particular physical locations?*

Judge Edwin L. Nelson remarked that the increased reliance on technology does not necessarily result in savings or efficiencies. The real potential for effective use of technology, he said, will be felt when we design and adapt processes to information technology, rather than automating current processes. The electronic case files component of CM/ECF will actually change some processes, because filers will be creating docket entries, and case records will be fully accessible to judges and authorized court personnel at all times and from any computer. Judges and court staff will be able to work from remote locations. Judge Nelson observed that because these systems are relatively new and some business processes are undergoing change, the overall future organization and staffing implications have not yet been fully considered. Judge Jane Roth commented that her committee has an interest in understanding the space implications of the new electronic case files system.

Judge Anthony J. Scirica, chair Committee on Rules of Practice and Procedure, described the rules-related issues associated with technology and remarked that judges and lawyers have generally been successful in adapting the existing rules, designed for the paper world, to the digital world. Although there are specific areas where changes in the rules have been necessary, to date, these changes rely either on local rules of court or the consent of the parties.

The Rules Committee does not at present contemplate the adoption of any national rule governing electronic filing, signatures, and service that does not depend on local rules or consent of the parties. Even though the committee has a mandate to promote uniformity of rules, Judge Scirica noted that technology may be the exception – it makes sense for the Committee to allow more local experimentation before there are national rules. Because technology is changing so fast, any rule that is promulgated may be out of date in a short period. Instead, the Committee has a technology subcommittee which monitors the implementation of the electronic case files system, CM/ECF, and has worked with the Committee on Court Administration and Case Management to draft model local rules to implement that system. Judge Scirica stated that the federal rules have held up quite well in the face of technological change, and the committee prefers to approach change in a cautious and deliberate manner.

Seeking Broader Input on Planning Issues and Encouraging Court Planning

Chief Judge John Lungstrum, chair of the Committee on Court Administration and Case Management, reported that the Committee's new planning subcommittee thought it would be useful to seek input on strategic issues from chief judges. Other committee chairs expressed support for the idea, and Judge Lungstrum suggested a letter be sent from Judge Butler on behalf of all the committees involved in planning. Subsequent to the meeting, a letter was sent to all chief judges on April 16, 2002. The letter asked for general ideas on planning issues, as well as suggestions for particular committees. Responses will be distributed to the appropriate committees for consideration.

At the suggestion of Chief Judge Robin Cauthron, chair of the Defender Services Committee, the committee chairs expressed interest in conveying to chief judges the value of long-range planning at both the national level and the local level. As a result of this discussion, the Federal Judicial Center was asked to add a segment on long-range planning to the April 2002 chief district judges' conference. Chief Judges Butler, Lungstrum and Cauthron addressed the chief judges at that session, along with Chief Judge Irene Keeley (WV-N), whose court has completed a district long-range plan.

In closing, Judge Butler thanked the meeting participants and staff for their efforts, and urged further discussion of the issues by the committees at their upcoming meetings. He reiterated Judge Heyburn's and the Budget Committee's keen interest in further consideration by program committees of areas in which future savings may be possible.

Appendix A: Participants in the March 2002 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator, Executive Committee Hon. Charles R. Butler, Jr.	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee Hon. Joel M. Flaum Hon. Thomas F. Hogan Hon. Carolyn Dineen King	Helen Bornstein
Committee on the Administrative Office Hon. Lourdes G. Baird, Chair	Cathy A. McCarthy
Committee on Automation and Technology Hon. Edwin L. Nelson, Chair	Mel Bryson Terry Cain
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy, Chair	Francis F. Szczebak Kevin Gallagher William T. Rule
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. Lawrence L. Piersol, Economy Subcommittee Chair	George H. Schafer Gregory Cummings Bruce E. Johnson James R. Baugher
Committee on Court Administration and Case Management Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky

Committee on Criminal Law Hon. William W. Wilkins, Jr., Chair	John M. Hughes Kim Whatley
Committee on Defender Services Hon. Robin J. Cauthron, Chair	Theodore J. Lidz Steven G. Asin
Committee on Federal-State Jurisdiction Hon. Frederick P. Stamp, Jr., Chair	Mark W. Braswell Karen M. Kremer
Committee on the Judicial Branch Hon. Deanell R. Tacha, Chair	Steven Tevlowitz
Committee on Judicial Resources Hon. Dennis Jacobs, Chair	Alton C. Ressler Charlotte G. Peddicord H. Allen Brown
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair	Thomas Hnatowski Douglas A. Lee
Committee on Rules of Practice and Procedure Hon. Anthony J. Scirica, Chair	Peter G. McCabe John K. Rabiej
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman Dennis P. Chapas Susan Hayes Linda Holz Sara Walters
	Other Administrative Office Staff: Jeffrey A. Hennemuth Ellyn L. Vail Steven Schlesinger Robert Lowney Glen Palman

Appendix B: Committee Strategic Issues

(Included as Attachment 1 of the long-range planning agenda item)

UNITED STATES DISTRICT COURT
Southern District of Alabama
113 St. Joseph Street
Mobile, Alabama 36602

251-690-2175

Charles R. Butler, Jr.
Chief Judge

April 16, 2002

MEMORANDUM TO ALL CHIEF JUDGES, UNITED STATES COURTS

SUBJECT: Planning Issues

RESPONSE REQUESTED BY: May 31, 2002

I am writing to you in my capacity as the long-range planning coordinator for the Executive Committee of the Judicial Conference. The purpose of this memorandum, as Chief Judge John Lungstrum and I pointed out at the district chief judges conference last week, is to seek your input on planning issues and to ask for suggestions about additional matters or ideas you think the Conference committees ought to consider.

Following the publication of the *Long Range Plan for the Federal Courts* in 1995, each Judicial Conference committee has engaged in planning activities within its area of jurisdiction. In addition, since April of 1999, chairs of Judicial Conference committees have met semi-annually to discuss crosscutting strategic issues of importance for planning and budgeting. These planning meetings provide an opportunity for the committee chairs to explore ways to maximize the effectiveness of the programs within their committees' jurisdiction and to plan for the future consistent with the judiciary's core values and goals. A list of crosscutting and specific strategic issues identified by the committees is attached for your reference.

The committee chairs are interested in your views on what developments or issues will be of importance in your court or for the judiciary generally over the next several years or beyond. Also, where do you see a need for change or an opportunity to do things better? We are interested in any creative ideas you have for improving the efficiency and effectiveness of the judiciary's programs and ensuring the quality of justice. Your suggestions may be broad or specific in nature. They can pertain to any aspect of the judiciary's business, including staffing, budget, technology, facilities, rules, defender services, probation and pretrial services, case management, statistics, demographic or economic changes, etc. We are seeking your views as chief judge, but we also encourage you to consult with your judicial colleagues, court managers, and others.

Please send us your suggestions or ideas to aid the planning process. Your ideas will be shared with the appropriate committees and may be discussed at future long-range planning meetings. Due to mail delays, it would be best to send your letter by fax or e-mail to Cathy McCarthy, Deputy Associate Director, at the Administrative Office, fax (202) 502-1155, phone (202) 502-1300, and she will forward them to me.

Charles R. Butler, Jr.

Attachment