COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Scottsdale, AZ
January 6-7, 2006

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 6-7, 2006

1. Opening Remarks of the Chair

   A. Report on the September 2005 Judicial Conference session
   B. Transmission of Judicial-Conference approved proposed rules amendments to the Supreme Court

2. **ACTION** — Approving Minutes of June 2005 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 Appellate Rules Committee

6. Report of the Bankruptcy Rules Committee

   A. Status Report on Interim Bankruptcy Rules and Official Forms Implementing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
   B. Discussion of Impact of the Bankruptcy Reform Legislation on Rulemaking Process
   C. Minutes and other informational items

7. Report of the Civil Rules Committee

   A. **ACTION** — Approving publishing for public comment proposed amendment to Rule 8 (defer publication pending submission of other proposed rule amendments)
   B. Status report on comprehensive restyling of rules
   C. Minutes and other informational items

8. Report of the Criminal Rules Committee

   A. **ACTION** — Approving publishing for public comment proposed amendments to Rules 1, 12.1, 17, 18, 32, and new Rule 43.1 to implement the Crime Victims Rights Act
   B. Status report on proposed amendments to Rule 29, Judgment of Acquittal, and to Rule 16, dealing with *Brady* issues
   C. Minutes and other informational items

9. Report of the Evidence Rules Committee

   A. Status report on proposed legislation and rules amendments on inadvertent disclosure of privileged information
   B. Minutes and other informational items

10. Report of the Time-Computation Subcommittee

11. Report of the Technology Subcommittee (Oral report)

12. Long-Range Planning Report

13. Panel Discussion on Chief Justice Rehnquist's Support of the Rulemaking Process

14. Next Meeting: June 22-23, 2006, in Washington, D.C.

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Judge Anthony J. Battaglia
Professor Nancy J. King
(Open)
DOJ representative

Subcommittee on E-Government Act
Judge Harvey Bartle III, Chair
(Open)
DOJ representative

Subcommittee on Grand Jury
(Open), Chair
(Open)
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
DOJ representative

Subcommittee on Preliminary Proceedings
Judge Anthony J. Battaglia, Chair
(Open)
DOJ representative

Subcommittee on Rule 16/Brady
Donald J. Goldberg, Chair
Judge Harvey Bartle III
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
DOJ representative

Subcommittee on Rule 29
Judge David G. Trager
Professor Nancy J. King
DOJ representative

Subcommittee on Rule 41
(Open), Chair
Judge Harvey Bartle III
Professor Nancy J. King
(Open)
DOJ representative

Subcommittee on Victims Rights Act
Judge James P. Jones, Chair
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ representative

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

December 15, 2005
Projects

RULES COMMITTEE MEMBERS AND TERMS*

(November 2005)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

	End Date
David F. Levi, Chair	2006
David J. Beck	2009
Paul J. McNulty	Open
Douglas R. Cox	2011
Sidney A. Fitzwater	2006
Harris L Hartz	2009
Mary Kay Kane	2006
John G. Kester	2010
Mark R. Kravitz	2007
William J. Maledon	2011
J. Garvan Murtha	2006
Thomas W. Thrash, Jr.	2006
Charles Talley Wells	2006
Daniel R. Coquillette, Reporter	Open

ADVISORY COMMITTEE ON APPELLATE RULES

	End Date
Carl E. Stewart, Chair	2008
James F. Bennett	2011
Paul D. Clement	Open
Thomas S. Ellis III	2009
Randy J. Holland	2010
Mark I. Levy	2009
Maureen E. Mahoney	2011
Stephen R. McAllister	2010
Jeffrey S. Sutton	2011
[*vacancy*]	----
Patrick J. Schiltz, Reporter	Open

*Terms of office based on two 3-year term appointments

ADVISORY COMMITTEE ON BANKRUPTCY RULES

	End Date
Thomas S. Zilly, Chair	2007
G. Eric Brunstad, Jr.	2011
R. Guy Cole, Jr.	2009
Irene M. Keeley	2008
Christopher M. Klein	2006
J. Christopher Kohn	Open
J. Michael Lamberth	2011
Mark B. McFeeley	1007
William H. Pauley III	2011
Lawrence Ponoroff	2010
Richard A. Schell	2009
K. John Shaffer	2006
Laura Taylor Swain	2008
James D. Walker, Jr.	2006
Eugene R. Wedoff	2010
Jeffrey W. Morris, Reporter	Open

ADVISORY COMMITTEE ON CIVIL RULES

	End Date
Lee H. Rosenthal, Chair	2006
Michael M. Baylson	2010
Jose A. Cabranes	2010
David G. Campbell	2011
Frank Cicero, Jr.	2009
Steven S. Gensler	2011
Daniel C. Girard	2010
C. Christopher Hagy	2009
Nathan L. Hecht	2006
Robert C. Heim	2008
Peter D. Keisler	Open
Paul J. Kelly, Jr.	2007
Thomas B. Russell	2006
Chilton Davis Varner	2010
Edward H. Cooper, Reporter	Open

ADVISORY COMMITTEE ON CRIMINAL RULES

	End Date
Susan C. Bucklew, Chair	2007
Harvey Bartel III	2007
Anthony J. Battaglia	2009
Robert H. Edmunds, Jr.	2010
Alice S. Fisher	Open
Robert B. Fiske, Jr.	2006
Donald J. Goldberg	2006
James P. Jones	2009
Nancy J. King	2007
Thomas P. McNamara	2011
Richard C. Tallman	2010
David G. Trager	2006
Mark L. Wolf	2011
Sara Sun Beale	Open

ADVISORY COMMITTEE ON EVIDENCE RULES

	End Date
Jerry E. Smith, Chair	2007
Joseph F. Anderson, Jr.	2011
Joan N. Ericksen	2011
Thomas W. Hillier II	2006
Robert L. Hinkle	2008
Andrew D. Hurwitz	2010
Patricia Lee Refo	2006
Thomas B. Russell	2006
William W. Taylor III	2010
Ronald J. Tenpas	Open
David G. Trager	2006
Daniel J. Capra	Open

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 20, 2005

****

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

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At its September 20, 2005 session, the Judicial Conference of the United States:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2005.

Committee on the Administration of the Bankruptcy System

Approved with respect to certain bankruptcy judgeships the fixing and transfer of official duty stations and designation of additional places of holding court requested by the circuit judicial councils and recommended by the Director.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Approved adoption of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2007, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed new Appellate Rule 32.1 with the condition that the rule would apply only to judicial dispositions entered on or after January 1, 2007, and agreed to transmit the proposed rule to the Supreme Court for its consideration with a recommendation that the rule be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 1009, 5005(c), and 7004 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 16, 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34, 37(f), 45, and 50 and Form 35 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Supplemental Rules A, C, and E, new Supplemental Rule G, and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), and 65.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rules 404, 408, 606, and 609 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Committee on Security and Facilities

With regard to the *U.S. Courts Design Guide*:

a. Endorsed *U.S. Courts Design Guide* Phase I revisions 9 through 18 and recommitted revisions 1 though 8 for further consideration;

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

December 15, 2005

Remarks of Judge David Levi Before Judicial Conference of the United States on Proposed New Appellate Rule 32.1

Thank you for the opportunity to speak to you this morning about proposed Appellate Rule 32.1, permitting citation to unpublished opinion. Judge Alito and I have divided the argument. I am going to speak about the history of this proposal and the process that we followed, and Judge Alito will address the specific content of the Rule and why the rules committees believe that the rule is a distinct improvement to our judicial system.

The basic point that I would like to leave you with is that this proposal is an example of the Rules Enabling Act process at its very best.

As you know, when it is working well, the Enabling Act process incorporates at least 5 important elements. (1) It is transparent. The meetings of the Committees are open to the bar, to the media, and to the public (2) It is deliberative. At a minimum the process takes 3 years and usually involves a good longer than that. Both the advisory committee and the standing committee give close and repeated scrutiny to any rule change. (3) It is participatory. The public hearings and the opportunity to submit written comment not only provide important information and feed back but it is part of the way in which the Committees build toward a consensus. (4) It is informed by

scholarship – our excellent reporters – and the invaluable empirical research of the Federal Judicial Center. (5) It is respectful of the limits of the Enabling Act and it is responsive to the legitimate interests of the two other branches, both of whom take a keen interest in our work, but also generally support the Enabling Act process.

All of these elements can be seen at work in the development of proposed 32.1.

The advisory committee began considering a rule change in the early 1990s in response to the recommendation of the Federal Courts Study Committee that no-citation policies should be reviewed in light of "inexpensive database access" to all opinions. The 1995 Long Range Plan also commented upon the lack of consistency in circuit citation rules and the need for clearer standards.

In 2001 the Solicitor General proposed a rule change permitting citation to unpublished opinions. After due consideration, the rules committee decided to publish a proposal in 2003. By that time Congress had passed the E Government Act, requiring courts to post all opinions, including unpublished opinions, on the internet. A subcommittee of the House Judiciary Committee had also held oversight hearings on this precise issue of citation in June 2002. Also, by that time, many of the Circuits had reconsidered their no citation policies. As you know, 9 of the circuits now permit citation of unpublished opinions at the discretion of counsel.

The comment on the proposed rule was very considerable. Over 500 comments were received on both sides of the issue. There was a full day of testimony before the Committee. The ABA, the American College of Trial Lawyers and the Department of Justice submitted comments supporting the proposed rule. Several esteemed appellate judges testified both for and against the proposal.

Having considered this comment, in April 2004 the advisory committee voted to send the rule

forward to the Standing Committee for its approval.

At its meeting in June 2004 the Standing Committee closely examined the proposal and the comments. The Committee discussed the issue at great length. The Committee decided that some of the practical concerns that had been raised, particularly by thoughtful appellate judges, were amenable to empirical consideration and that the advisory committee should undertake that kind of study before moving forward on the rule. This action extended the timetable by one additional year.

In response to our request, the FJC surveyed all 257 circuit judges as well as a sample of attorneys who had appeared in federal appeals cases. In sum, the responses of the judges did not support the view that the proposed rule would have any effect on the length of unpublished opinions or the time spent preparing unpublished opinions. Nor did the survey support the prediction that citations to unpublished opinions in the briefs would create significant additional work for the judiciary. The attorney surveys were to the same effect. The attorneys predicted no appreciable impact on their workloads were unpublished opinions freely citable. Further, in a study of circuits with liberal citation rules, the AO found no support for the fear that permissive citation rules affect median case disposition times or the frequency of summary dispositions.

In light of this further work, the Advisory Committee voted again in favor of the proposal. All three of the appellate judges on the committee, Judge Alito, Judge Carl Stewart, and Judge John Roberts, spoke strongly in favor of the rule change. The Department of Justice continued to support the new rule.

The Standing Committee, which had so many questions one year earlier, was now unanimous in its support of the proposal.

It is not often that judges submit comment on the rules and even rarer that they testify. When

they do we pay particular attention. There is no question that the testimony and comment from esteemed judges, particularly those opposed to the rule, substantially raised the quality of the eventual work product and assisted the Committees in fully considering the issues raised by the proposal.

We therefore come to the Judicial Conference with the fullest possible record and the highest degree of confidence in the proposed rule. Thank you.

OPENING REMARKS
BY
THE HONORABLE ANTHONY J. SCIRICA

THE AMERICAN LAW INSTITUTE

82ND ANNUAL MEETING
PHILADELPHIA, PENNSYLVANIA
MAY 16-18, 2005

President Traynor: It is a special pleasure now to welcome Anthony J. Scirica, Chief Judge of the United States Court of Appeals for the Third Circuit, to help open this Annual Meeting in Philadelphia. It is an ALI tradition to invite a renowned jurist to speak to us at our opening session, as Chief Justice Rehnquist did in Washington last year.

Judge Scirica has served as Chief Judge since 2003 on the Third Circuit, as a judge on that circuit since 1987, and as a United States District Judge for the Eastern District of Pennsylvania between 1984 and 1987. He was appointed to both judgeships by President Ronald Reagan.

His notable and early public and professional service reflects in one person nearly all of the variety of experience reflected in our members. He was a state-court judge, an Assistant District Attorney, a member of the Pennsylvania House of Representatives, a law teacher, a private practitioner, and a Fulbright Scholar in Caracas, Venezuela. As a Pennsylvania legislator, he chaired the Judiciary Subcommittee on Crime and sponsored the state divorce code, the sentencing-guidelines code, and the witness-immunity act. He is a former Chair of the Pennsylvania Commission on Sentencing. He also is currently an adjunct professor at the University of Pennsylvania Law School and in Duke's appellate-practice course, and he will be a faculty member on ALI-ABA's program on employment law in July.

Our speaker is an active and constructive contributor to the work of the ALI, particularly as an Adviser on our new Aggregate Litigation Project, a member of our Special Committee on Federal Judicial Code Revision, and an Adviser on his good friend Geoff Hazard's now completed project on Transnational Civil Procedure.

In the Judicial Conference of the United States, Judge Scirica served on the Advisory Committee on Civil Rules from 1992 to 1998, and chaired the Standing Committee on Rules of Practice and Procedure from 1998 to 2003.

If you ever appear before his court, you should expect that he appreciates succinct answers. For example, when asked by an interviewer, "How frequently should the rules be amended?," Judge Scirica answered, "Only when necessary." (*Laughter*) Expansively, he then added: "The

rules committees are sensitive to the burden imposed on the bench and bar whenever a rule is changed."

Tony, we are delighted you are with us today and look forward to your talk on the relationship between the judiciary and Congress on the Rules Enabling Act. Thank you. (*Applause*)

I can't help but comment that Tony wore the colors of the University of California, blue and gold, as I did. That was totally —

Chief Judge Anthony J. Scirica (Pa.): Except I'm a Wolverine and went to law school at the University of Michigan. (*Applause*) (*Laughter*)

Mike, thank you very much for those generous remarks.

On behalf of the judges and lawyers who practice in the state and federal courts in the Third Circuit, let me extend to you a warm welcome.

When I became Chief Judge I asked a good friend, a former chief judge, "What's it like?" And he smiled and with a twinkle in his eye he said, "You know, it's a bit like being the caretaker in the cemetery — you're over top of everybody but no one is listening." (*Laughter*)

It is a great privilege to be here with you. The ALI is truly an extraordinary organization. I have immense respect for its leadership, its members, and its work.

This morning, I'd like to say a few words about rulemaking and the Rules Enabling Act. You should know that there is a strong and happy connection between the ALI and the federal rules. Many ALI members have been deeply involved in rulemaking — in recent times, none more so than Geoff Hazard and Charlie Wright — and also Ed Cooper, Mike Boudin, Mary Kay Kane, Sheila Birnbaum, Lee Rosenthal, Christine Durham, Myles Lynk, John Rabiej, and many others, and one of the newest members of the ALI Council, the very able Chair of the Standing Rules Committee — David Levi.

Before I get into my talk, let me again extend to all of you a very warm welcome to the Annual Meeting, to Philadelphia, the city of Ben

Franklin and the founding city of the Republic, and to Pennsylvania, the Keystone State of the Union.

Some of you might be aware that Philadelphia and Pennsylvania can proudly claim many firsts: the first public school, the first hospital, the first flag, botanical garden, public library, volunteer fire company, school of anatomy, life-insurance society, corporate bank, daily newspaper, even the first law school, and the first zoo. With the greatest respect to Dean Fitts and the great law school at the University of Pennsylvania, I think our most wonderful achievement was the first zoo. (*Laughter*)

But for those of you who are not teetotalers, I must admit that, in at least one respect, our state has lagged behind most of the nation. For Pennsylvanians, the road from the repeal of prohibition has been long and arduous. For decades, Pennsylvania's blue laws prohibited restaurants from selling alcoholic beverages on Sundays. And so I would like to relate a story.

Some 30 years ago, when I served in the Pennsylvania legislature, a bill was introduced to permit the Sunday sales of alcohol. The debate in the legislature would have sounded familiar to anyone who lived through the passage of the Volstead Act and its subsequent ratification and repeal. So one long night, after hours of rancorous debate, with tempers frayed and emotions high, a legislator from my home county took the floor and from the well of the House he declared, "Mr. Speaker, Mr. Speaker, I want the members of this House to know that my grandfather, who lived to the age of 95, drank a pint of whiskey every day of his life, and three days into his casket he looked better than all the opponents arguing against this bill." (*Laughter*)

Well, it's been 71 years since its enactment and the Rules Enabling Act still looks better than all of its critics. At this particular time, a time of some tension between Congress and the judiciary, it is worth pausing a moment to reflect on the Rules Enabling Act. Its origins reflect the judgment to displace state procedural law and to erect a system of uniform federal procedural law. But it represents in its deepest sense, a manifestation of the traditional doctrine of separation of powers. It has been described as a treaty between Congress and the judiciary, a treaty between

co-equal branches of government, a treaty about who makes procedural law, and how it is done.

As you know, the Rules Enabling Act specifies that "the Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence," but "such rules shall not abridge, enlarge or modify any substantive right."

Yet it is not always easy to discern the line between substantive and procedural law. Nor can these complementary and interdependent "branches" of law be viewed in isolation. Procedure affects substance. Procedural law prescribes the course of litigation — but it also implicates access to the judicial system and most importantly, can affect outcome.

Perhaps for this reason, in most of the world procedural law is made by elected constituent assemblies. Our heritage, our tradition, is different from the civil-law system. And so Congress, while maintaining its authority to make procedural law, delegated the essential rulemaking function to the Supreme Court. At the same time, it retained the ability to review and reject any rule adopted by the Court. The history of this institutional power sharing illustrates the explicit conflicts and the resulting tension inherent in our separation of powers, and the ability of one branch of government to counter and check the actions of another branch.

Since the adoption of the Rules Enabling Act, there have been unsettled periods in rulemaking — periods of controversy resulting in Congressional action. From time to time, prominent commentators have decried the willingness of Congress to intervene in rulemaking and to second-guess the process. But controversy is neither avoidable nor surprising in a government of divided powers and responsibilities.

It is remarkable then, that only from time to time, has Congress challenged the procedural rules promulgated by the Supreme Court and in recent years, none have been rejected. In those few turbulent periods, however, the challenge was intense and vigorous. Nonetheless, for the most part Congress has largely deferred to the Supreme Court. Why is this so?

Thoughtful scholars like Steve Burbank and others have plumbed the reasons. But as one who spent more than a decade in rulemaking, first on the Advisory Committee on Civil Rules and then as Chair of the Standing Committee on Rules of Practice and Procedure, I venture to make a few observations.

Like all treaties between powerful actors, there is bound to be tension and conflict. But in my view, the treaty performs admirably. Its success depends on a delicate balance of authority, on mutual respect, on cooperation between the judicial and legislative branches of government. And at least since the adoption of the 1988 amendments, the result has been deliberative rulemaking, largely insulated from the influence of raw political interests.

The openness mandated by Congress plays a crucial role. It encourages the expression of different points of view and provides the constructive criticism essential for careful, deliberative rulemaking. Each rule runs the gauntlet of painstaking drafting in both the Advisory and Standing Committees, always with the benefit of public comment from experts and generalists. The process is slow. It takes at least three years. But it ensures the rigorous scrutiny and public review essential to establish the credibility and legitimacy of the rulemaking process.

Retaining the public's confidence is critical. The bench, bar, and of course, Congress and the executive branch, must be confident of the fairness and essential worth of the process. To that end, the rules committees reach out to interested persons and groups. The committees maintain a constant dialogue with bar organizations, public-interest groups, individual lawyers, the Department of Justice, and the academy. The Rules Enabling Act requires the judiciary to "carry on a continuous study of the operation and effect" of the rules. Proposals received from the bench, bar, and public help meet these statutory responsibilities.

Yet it was not always so. After several decades of relative calm, the landscape changed abruptly in the 1970s, when Congress reacted against the newly proposed Rules of Evidence and especially, the attempt to supersede evidentiary privileges established by state law. This clash, which resulted in retaining reliance on applicable state law and federal common law, also

prompted criticism of the rulemaking process — the most grave charge was that the process was not sufficiently open or accessible to public comment. The 1980s saw a comprehensive Congressional review of rulemaking, and in 1988, Congress mandated open meetings and records.

After this period of debate and reflection resulting in the 1988 amendments, Congress in the early 1990s intervened once more by challenging the proposals for Rule 11 mandatory sanctions and Rule 26 disclosures, and by enacting the Civil Justice Reform Act. Since that time, except for a few bumps in the road, both Congress and the judiciary have proceeded on a fairly smooth course — Congress contesting some rules but not rejecting them — and from time to time, enacting rules by statute.

In recent years, members of the House and Senate have introduced between 30 and 50 bills each session to amend the rules directly. Almost none have been enacted. The rules committees closely monitor Congressional activity and communicate directly to the Chairs of the House and Senate Judiciary Committees and their staffs. Almost always, the rules committees have been successful in persuading Congress to channel possible legislative action through the rulemaking process.

Since the 1988 amendments, whatever one's views on the merits, it is common knowledge that rules proposals taken up and considered through the Rules Enabling Act receive exacting and meticulous attention. I don't believe it would be unfair to observe that rules proposals are not likely to receive the same careful attention and treatment in Congress. But how could they? Depending on the rule, depending on the stakes at hand, political or economic interests untempered by careful deliberation could carry the day. Whatever the defects in the Rules Enabling Act process, that does not happen. Even under the best circumstances, the heavy burdens on Congress make it extraordinarily difficult for them to devote the time and care necessary for reflective rulemaking.

In the 1970s controversy over the proposed privilege rules to the Rules of Evidence, critics charged that the rulemakers had abridged substantive rights. In rejecting several proposed rules, Congress adopted a

single rule on privileges, Rule 501, which as noted, retained reliance on state law in the first instance and then on federal common law. In my view, the critics were on target. Testimonial privileges involve significant and controversial policy choices. They also implicate concepts of federalism. In my view, Rule 501 struck the proper balance.

But that conflict was long ago. In recent years, if members of Congress could view first hand how the rules committees go about their work, if they could assess the hard thought brought to the task by its members and reporters, they would also see the reluctance to trespass into making substantive law. As noted, the Rules Enabling Act specifies that "such rules shall not abridge, enlarge or modify any substantive right." For this reason, the rules committees are vigilant about proposals that might alter the substantive law. And to the extent the rules committees are vigilant in adhering to their mandate and in avoiding transgressions into substantive law, they retain standing and credibility in persuading Congress to refrain from encroaching onto procedural law.

What have been some of the points of contention between Congress and the rulemakers? Where are those intersections of procedural and substantive law that are likely to generate controversy and lead to confrontation? Perhaps no rule better demonstrates the complexity of rulemaking and the delicate balance between Congress and the judiciary than Rule 23 on class actions, a rule that straddles the boundary between substance and procedure. Few would deny that aggregation of claims has a profound effect on the substantive rights of the parties. Adopted at the height of the civil-rights movement, Rule 23 has evolved beyond anything foreseen by its drafters in 1966. But that we live in a society of mass production and aggregation is a fact of modern life. Civil litigation has become part of our system of governance and the treatment of mass claims, this notion of collective rights, has evolved into a powerful instrument of social policy, exemplified in part in the concept of the private Attorney General.

Recognizing that mass claims were arguably the most vexing issue in modern civil litigation, the Advisory Committee on Civil Rules 15 years ago, commenced a study of Rule 23. Focusing initially on class-cer-

tification standards, the Committee considered and then rejected amendments to take into account the cost and burdens of certification. Recognizing the pivotal role of the decision to grant or deny class certification, which may sound the death knell of the litigation or create irresistible pressure to settle, the Committee proposed Rule 23(f), the discretionary interlocutory appeal. As you know, it was adopted. After a period of repose to digest the fruits of *Amchem* [Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)] and *Ortiz* [Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)], and after a period of study by a Mass Torts Working Group, the Committee took up improvements in class-action procedures and the problems of duplicating and overlapping class actions in federal and state courts, raising the question whether truly national class actions involving state-law claims should be tried or settled in a state or federal court. Recognizing that these issues implicated competing principles and crossed many lines — most significantly, the distinction between substantive and procedural law and principles of federalism — the proper allocation of jurisdiction between state and federal courts, the rules committees considered proposals permitting federal injunctions against competing or overlapping class actions in state and federal courts. But after considering the constraints of the Anti-Injunction Act and the scope of rulemaking authority under the Rules Enabling Act, the Advisory Committee withdrew the proposals from consideration by the Standing Committee.

What is significant here, is that the rules committees drew back from their published proposals on competing and overlapping class actions, solely because they determined they were skirting the outer boundary of the Rules Enabling Act, or would likely violate the Anti-Injunction Act. These were matters better addressed by Congress, or by decisional law. As you know, Congress addressed these difficult policy choices in the Class Action Fairness Act of 2005.

In this recent era, the most serious departure from the Rules Enabling Act was the adoption of a heightened pleading standard in the Private Securities Litigation Reform Act, one of Congress's initial steps into the area of "tort reform." Responding to perceived abuses of strike suits in private securities actions, Congress determined to raise the bar in

bringing suit by adopting a requirement to plead with particularity, a major deviation from notice pleading. The Act also provided for Rule 11 sanctions, a watered-down surrogate for fee shifting that was favored by the Act's sponsors and mandated an automatic stay of discovery pending decision on a motion to dismiss.

The Private Securities Litigation Reform Act also represented a departure from the uniform and transubstantive nature of the federal rules. One of the hallmarks of the federal rules is that federal substantive law calls for application of uniform procedural law. Yet it is a legitimate question whether special subjects should entertain special procedures. But the burden of proof to deviate from uniform rules should be a heavy one. The heightened pleading standard in the Private Securities Litigation Reform Act was controversial in Congress and would have been controversial with the rulemakers. In my view, it would not have survived the rulemaking process through the Judicial Conference. Should the rules committees sometime in the future decide to review the concept of notice pleading, there will likely be great interest from all quarters.

What are some other flash points with Congress?

Discovery — its cost and delay, and its ability to exert hydraulic pressure on settlement has been a recurring theme, and featured prominently in the 1993 amendments to the civil rules occasioned by the adoption of the Civil Justice Reform Act. A few years later, discovery was again on the front burner. Plaintiffs sought relief from abusive depositions; defendants sought relief from abusive document requests.

The discovery amendments in year 2000, especially narrowing of the scope of discovery in Rule 26(b), were strongly contested in the rules committees and in the Judicial Conference, where they were adopted in a close vote. The Administration at that time initially supported the proposals, then changed its mind and opposed them. The opposition continued its challenge in Congress, but failed to maintain traction and the rules were adopted without much fuss.

Rule 11 has been controversial for years. This perennial hot-button issue has excited the interest of both the Supreme Court and Congress.

At the current time, Congress is again considering amending Rule 11 to reinstate the 1983 Rule 11 provision that mandated sanctions against lawyers who file frivolous lawsuits. A recent survey of 400 federal judges conducted by the Federal Judicial Center reported that roughly 90 percent of the judges objected to the proposed statutory change. The survey, in turn, was strongly criticized by the House and Senate sponsors of the bill.

The criminal rules are somewhat different from the others. As you know, the Department of Justice is the most frequent litigant in the federal courts. As such, it is vitally interested in all the federal rules and brings to the table much expertise. Of even greater importance, it brings to the table the executive branch of government. But it also has a direct interest, perhaps an essential stake in the criminal rules. When disappointed suitors of the rules committees are rejected, there is a temptation to go directly to Congress and begin anew the courtship. On criminal matters, especially in this post-9/11 world, the Department of Justice usually receives a receptive hearing in Congress. To their credit, for the most part, they have not pursued that route. Their many fine lawyers have worked through the Rules Enabling Act and continue to do so.

You should know that the Assistant Attorney General for the Criminal Division is a member of the Advisory Committee on Criminal Rules, and the other key deputies sit on the other rules committees — with the Deputy Attorney General serving on the Standing Committee.

Nonetheless, the pressing matter of homeland security explains another recent deviation. In November 2002, in the waning days of the session, Congress passed the Homeland Security Act. Among other provisions, it directly amended Criminal Rule 6 to permit the disclosure of grand-jury material relating to terrorism and sabotage to foreign-government officials. Most observers would agree this was a worthwhile change. A rules change would have taken three years.

But a revised version of Rule 6 was already in the pipeline and on December 1, it became effective. Not only did the statutory change amend the old rule, but the new rule superseded the statute. The rules committees notified Congress of the need for corrective legislation and

the matter was easily remedied. What was troubling, however, was that Congress acted without notice to or consultation with the rules committees. Nor was there notice or consultation from the Department of Justice. From time to time, occasions may arise that call for prompt rules amendments. In those circumstances, the rules process can be expedited or statutory changes may be appropriate such as in matters of national security. But communication and consultation between all three branches of government are essential for effective rulemaking.

Local rules are another recurring problem. There are 5000 to 6000 local federal rules. Because inconsistent local rules undermine national uniformity, Charlie Wright called them "the 'soft underbelly' of federal procedure." There is another unique feature of local rules — they evade Congressional scrutiny under the Rules Enabling Act. Then there are standing orders. Standing orders evade scrutiny from everyone, except perhaps the Almighty. (*Laughter*)

From time to time, the organized Bar becomes energized and prods both the judiciary and Congress to action. Yet Congress has sent mixed signals to the judiciary. The 1988 amendments to the Rules Enabling Act, which "were designed in part, to restrict the use of local rules" and to guard against inconsistency and duplication, provided that local rules are subject to review by the circuit judicial councils. Yet two years later, Congress passed the Civil Justice Reform Act, which encouraged local-rule experimentation, resulting in even less uniformity.

On its own, the Judicial Conference, through successive Local Rules Projects, has made some progress in reducing reliance on local rules. The 1985 and 1995 amendments to Rule 83 providing for notice and comment, uniform numbering, and protecting against loss of rights relating to matters of form, have been effective. Also under the E-Government Act, local rules and standing orders will now be posted.

Another flash point is the Rules on Attorney Conduct. In its initial review of local rules, the Standing Committee became aware of significant variations in attorney-conduct rules among the district courts, and variations between federal and state rules. Because the states are charged with attorney licensing and discipline, the Standing Committee favored a sys-

tem of dynamic conformity — each district court would follow the rules of the state where it sat. But the Department of Justice, especially the criminal division, had encountered problems with certain state conduct rules, especially prohibitions against direct contact with represented parties. Congress entered the fray by adopting the McDade Amendment, which subjected federal-government attorneys to state ethics rules, and also to local federal rules, which sometimes conflict with the state rules. But it later turned out that Congress, too, was divided on the issue, and some members, especially in the Senate, favored giving relief to federal-government attorneys. On this matter, there has been good communication among all interested parties, but as yet no agreement.

It is important to note there are many instances of cooperation between Congress and the rulemakers, especially when they collaborate on new rules occasioned by new statutes. In the new Bankruptcy Act, Congress directed the Judicial Conference to adopt rules implementing the Act. Congress made a similar directive with the E-Government Act, to adopt rules to implement privacy and security interests.

Also illustrative is Evidence Rule 412, the rape-shield rule. After a rocky beginning as a bill in Congress, it won acceptance after the Senate and House Judiciary Committees asked the Judicial Conference to draft a rule on an expedited basis. This is a prime example how Congress and the judiciary can cooperate on matters of vital interest to the judicial system.

Let me close by noting what many scholars and lawyers have observed — that as a practical matter, the only true restraints on Congress are self-imposed. But there are sound reasons for Congress to exercise self-restraint. The effects of the 1988 amendments that improved and strengthened the Rules Enabling Act have been salutary. In its current form, the Rules Enabling Act is structurally sound, carefully administered, and most importantly has resulted in thoughtful rules. It is well worth preserving. But without comity and cooperation among all three branches of government, it cannot function. And comity requires continuing dialogue and mutual respect. To the extent the bar and the academy can facilitate that dialogue, they will perform a great service to our judicial system.

And by the way, the Sunday sales bill became law, and perhaps last night some of you enjoyed its fruits. Thank you. (*Laughter*) (*Applause*)

President Traynor: Chief Judge Scirica, thank you so much for welcoming us and giving us a substantive talk about the Rules Enabling Act. It has great timely relevance to our project on Aggregate Litigation, as well as to our beginning project in the area of privacy and liberty and the thoughts you mentioned about the grand jury and so forth.

I was interested in learning that you consider slow the rulemaking process of almost three years or more. We are very proud in The American Law Institute that we (*laughter*) can complete our projects in as early as five years. Thank you very much.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 10, 2005

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court a proposed amendment to Rule 25 and new Rule 32.1 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that the amendment and new rule be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

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November 10, 2005

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By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 1009, 5005, and 7004 of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its September 2005 session. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 5, 9, 14, 16, 24, 26, 33, 34, 37, 45, 50, and 65.1; Form 35; and new Rule 5.1 of the Federal Rules of Civil Procedure, and proposed amendments to Rules A, C, and E, and new Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. The Judicial Conference recommends that these amendments and new rules be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposals, I am transmitting excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Reports of the Advisory Committee on the Federal Rules of Civil Procedure.

Leonidas Ralph Mecham
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November 10, 2005

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

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November 10, 2005

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 404, 408, 606, and 609 of the Federal Rules of Evidence. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 15-16, 2005
Boston, Massachusetts
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Boston, Massachusetts, on Wednesday and Thursday, June 15-16, 2005. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Deputy Attorney General James B. Comey
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Tim Reagan of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor David A. Schlueter, Reporter
Professor Sara Sun Beale, Consultant
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice were John S. Davis, Associate Deputy Attorney General, and Elizabeth Shapiro, Assistant Director, Civil Division.

INTRODUCTORY REMARKS

Judge Levi reported that new bankruptcy forms and interim bankruptcy rules must be in place by October 17, 2005, the effective date of the comprehensive new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This, he explained, will require an enormous amount of work by the Advisory Committee on Bankruptcy Rules.

He stated that the Standing Committee would miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — David Bernick and Charles Cooper. He reported that Judge John Roberts had been selected to replace Judge Samuel Alito as chair of the Advisory Committee on Appellate Rules. Judge Levi also noted that the Advisory Committee on Criminal Rules was about to lose its reporter, Professor David Schlueter, who will be replaced by Professor Sara Sun Beale. He also explained that Peter McCabe, the committee's secretary, was unable to attend the meeting because he was undergoing back surgery. He expressed the committee's best wishes for a speedy recovery.

Judge Levi reported that the Judicial Conference had approved changes in the civil and bankruptcy rules as part of the consent calendar at its March 2005 session.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 13-14, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that pending legislation would undo the successful 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure and require a judge to impose sanctions for violations of the rule. Mr. Rabiej explained that the legislation had been reintroduced in Congress a number of times over the years, and each time it had progressed further. Last year, he said, it had been passed by the House, but not by the Senate. This year it is likely that the House will pass it once again.

He noted that the Administrative Office had written to Congress in defense of retaining the 1993 amendments. The Federal Judicial Center, he pointed out, had conducted surveys and prepared a report on the issue. The Center's report, which was shared with Congress, found that district judges are remarkably unified in opposition to the proposed change in Rule 11. In addition, members of the committee had met with members of Congress to discuss the issue.

Mr. Rabiej reported that the Class Action Fairness Act had been enacted by Congress, and the Administrative Office is watching carefully for any impact it may have on the federal courts. There had been speculation in some quarters, he said, that the federal courts might be inundated by extra work as a result of the legislation, but the clerks of court have reported only a modest increase so far.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Reagan reported that the Federal Judicial Center had published empirical studies on both FED. R. CIV. P. 11 (sanctions) and proposed FED. R. APP. P. 32.1 (citation of judicial dispositions). He also distributed a status report on the various educational and research projects of the Center.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Amendments for Publication

PRIVACY PROTECTION RULES

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. P. 49.1

Judge Fitzwater reported that the E-Government Act Subcommittee had coordinated the development of new rules to protect privacy and security interests implicated by internet posting of electronic court filings. The subcommittee had produced a template rule for each advisory committee to use in adapting the rule to its own circumstances. The resulting rules, he said, were ready to be published for public comment and will undergo further style review during the comment process.

Professor Capra explained that the E-Government Act requires the federal judiciary to promulgate rules to protect the privacy of court filings made available on-line. He observed that the "practical obscurity" that had once protected private information in court case files is no more. The work of the subcommittee, he said, in large measure reflects the Judicial Conference's existing privacy policy, developed after comprehensive study by the Committee on Court Administration and Case Management.

The general principle guiding the subcommittee's work, he said, is that "public is public." In other words, whatever records are available to the public at the courthouse should also be available on the Internet, with certain exceptions. Otherwise, a cottage industry of Internet service providers would step in to disseminate courthouse information electronically.

Professor Capra explained that under the proposed rules — and existing Judicial Conference policy — parties must redact filings to eliminate certain personal identifiers, such as social security numbers and names of minor children. The redaction requirement

applies whether the documents are filed in paper form or electronically and whether they are available at the courthouse, on-line, or both. The new rules, though, make an exception for voluminous documents because it is very burdensome for parties to redact all the personal identifiers in extensive records.

Professor Capra noted that the Committee on Court Administration and Case Management had recommended that special treatment be given to social security cases because the records in those cases contain substantial amounts of private medical information that can only be redacted with considerable difficulty. Accordingly, the proposed rules specify that electronic remote access will not be provided for the records in social security cases.

He added that the Department of Justice had argued that records in immigration cases should receive similar treatment, because they too contain substantial private information. The Advisory Committee on Civil Rules agreed with the recommendation. In addition, he said, the E-Government Subcommittee had consulted with the Committee on Court Administration and Case Management, which agreed to the exemption for purposes of obtaining public comment. Therefore, proposed FED. R. CIV. P. 5.2(c) (privacy protection for filings made with the court) provides for restricted public access in both social security and immigration cases.

In addition, he explained, the new rules confirm a court's discretion on a case-by-case basis to protect private or sensitive information by limiting or prohibiting remote access by non-parties. The rules also provide that a party filing a redacted document may also file an unredacted copy of the document under seal. Finally, the new rules state that a party waives its privacy protections under the proposed rules by filing unredacted information not under seal.

Judge Alito reported that the approach adopted in the proposed appellate rule (FED. R. APP. P. 25(a)(5)) (privacy protection) is that, with limited exceptions, matters on appeal will continue to be governed by the applicable civil, criminal, or bankruptcy rules that had governed them in lower court proceedings. All other matters would be governed by the Federal Rules of Civil Procedure.

One participant asserted that there is also a need to provide an exemption for civil and criminal forfeiture cases. In a forfeiture, he noted, the government must identify the property to be forfeited. Indeed, in the case of a civil forfeiture, the property itself is listed as the defendant in an *in rem* proceeding. The government, moreover, must give public notice of the proceeding, usually by publication in a newspaper. Thus, he said, it would be anomalous for the government to have to redact the very information it is publicizing.

Professor Capra stated that a forfeiture exemption might not be necessary in bankruptcy cases. He suggested that for purposes of publishing the proposed rules, the matter might be left as presented by the Advisory Committee on Bankruptcy Rules, *i.e.*, with no exemption for bankruptcy cases. But the advisory committee could reconsider the matter following the public comment period.

Professor Morris responded that it is unclear whether there is a real issue in bankruptcy cases. The advisory committee, he added, would be pleased to consider the need for a forfeiture exemption in the bankruptcy rules as the public comments come in.

Judge Zilly noted that, in the bankruptcy context, the court does not see the forfeiture proceeding itself. All the judge sees is the government's motion for relief from the automatic stay, permitting it to forfeit the property. He suggested that a forfeiture exemption could be included in the amendments for publication, in order to achieve as much uniformity among the rules as possible while awaiting public comment. He added that the bankruptcy court can always seal or redact private information in particular cases, as appropriate.

One member observed that if the forfeiture exemption were included in the rules as published, it would be more likely to be noticed and to generate comments. If, however, the exemption were not included, few readers would notice the omission or comment on it.

One participant noted that, under the proposed amendments to the bankruptcy rules, certain privacy protections would attach to the names of persons known to be, and identified as minors. There may be many names listed in a bankruptcy case, some of which may be the names of minors, but no one will know as a practical matter who is a minor. Another participant stated that if the name of a parent is known, there is no doubt that someone who wants to can readily ascertain the name of the child. He reiterated that the judiciary must explain the insolubility of this problem, so that it does not face hostile and unfair criticism damaging to it as an institution.

Judge Levi reported that following discussion during a break, Judge Zilly and Professor Morris had agreed, on behalf of the bankruptcy advisory committee, that the new bankruptcy rule, as published, would be uniform with the other rules and include the same forfeiture exemption.

One member asked whether the suggested revisions to the respective sets of rules would be published side-by-side or separately. If published separately, the absence of a forfeiture exemption in the bankruptcy rules might not be noticed. Another participant added that an advantage of side-by-side publication is that it is easier for readers to

review inconsistencies between the revisions to the various sets of rules. Another participant suggested that the amendments be published in both formats.

One participant suggested the need for some public expression by the committee that the drafting task is extremely difficult. For one thing, it is impossible to predict the impact of future technology, and provisions may quickly become obsolete. Moreover, the rules inevitably will not satisfy all competing interests. Some will complain about inadequate protection of privacy, others about interference with the public's right to know.

Nevertheless, he said, the judiciary must proceed with national rules because of the specific statutory mandate to do so. But the publication should state that full reconciliation of the competing principles and interests at stake cannot be accomplished, certainly not with the current ability to predict future technology. The committee, thus, should document its awareness of these limitations on its capacity to deal with the problem. Professor Capra stated that he would prepare a draft insertion to this effect, and Judge Levi agreed to its inclusion.

The committee approved the proposed new rules and amendments for publication by voice vote, with one objection.

Amendments for Final Approval

MANDATORY ELECTRONIC FILING RULES

FED. R. APP. P. 25(a)(2)
FED. R. BANKR. P. 5005(a)(2)
FED. R. CIV. P. 5(e)

Professor Cooper noted that draft FED. R. CIV. P. 5(e) (filing with the court), along with its uniform counterparts in the appellate rules and the bankruptcy rules, would allow a court by local rule to require electronic filing of documents. The rule, he said, had its impetus in the fact that many courts have already mandated that all papers be filed electronically. In addition, electronic filing has the potential of saving significant resources for the courts.

Judge Zilly noted that there had been a good deal of public comment, most of which had focused on the need for courts to provide appropriate exceptions. Professor Cooper added that the draft committee note recognizes the importance of providing exceptions from the electronic filing requirement for those who cannot file by electronic means. But, he explained, the proposed rules do not specify which exceptions must be

provided. Instead, they permit a court by local rule to mandate electronic filing "if reasonable exceptions are allowed."

Professor Beale observed that there is no need for a parallel provision in the criminal rules because those rules specify that papers in criminal cases be filed in the manner prescribed by the civil rules.

Judge Alito noted that one circuit court recently had adopted a local rule mandating electronic filing. One purpose of the rule is to avoid the use of disks, because technological experts advise that it is much harder to screen for viruses on disks. In addition, electronic briefs offer a cost savings. Court employees have less need to cart heavy briefs around, and the clerk's office does not have to ship hundreds of pounds of briefs every month to the judges.

A participant added that electronic filing also helps expedite urgent appeals. He said that he knew of several appeals in which a court of appeals had specially ordered electronic filing in order to expedite the appeal.

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum of May 6, 2005. (Agenda Item 7) He noted that Professor Schiltz, the committee's reporter, was unable to attend the meeting.

Amendments for Final Approval

FED. R. APP. P. 32.1

Judge Alito reported that concerns had been expressed by appellate judges in some circuits that the proposed new Rule 32.1 (citation of judicial dispositions) would result in additional work for judges, lead to shorter opinions, delay disposition times, create inconsistencies in circuit case law, and impose additional research burdens on attorneys. The advisory committee, he said, had asked the Administrative Office and the Federal Judicial Center to conduct studies to determine whether there is empirical support for these claims.

In response, the Administrative Office had assembled data comparing disposition times, summary dispositions, and other indicators — before and after — in the circuits

that had changed their local rules to permit citation of unpublished opinions. The results showed that the permissive citation policy had resulted in few, if any, changes in these workload indicators.

Mr. Reagan reported that the Federal Judicial Center's study for the committee involved three research components: (1) a survey of federal judges; (2) a survey of attorneys; and (3) an examination of case files. The research approach had divided the circuits into "restrictive," "discouraging," and "liberal" circuits, in accordance with each circuit's current policy regarding citation of unpublished opinions.

Judge Alito noted that the Center study shows that very few judges sitting in the circuits with liberalized citation rules believe that restricting citation of unpublished opinions would reduce their workload. The great majority, rather, believe that the length of opinions would not change and there would be the same number of unpublished opinions. No significant increase in the judges' workload had occurred in the circuits that have liberalized their rules, and few judges in the survey had expressed concerns about inconsistencies in precedent.

One participant observed that he had been struck by the strength of conviction shown by the chief judges of the non-citation circuits. They had expressed fears about the workload and other consequences of permitting citation of unpublished opinions. But the empirical studies had substantially allayed his prior concerns. Judge Alito added that the Center study also appeared to have convinced some members of the advisory committee who initially had been skeptical of proceeding with a rule on unpublished opinions.

Another participant emphasized that he was unequivocally in favor of the proposed rule. He noted that the distinction between published and unpublished opinions had largely disappeared, as "unpublished" opinions are generally available from the electronic legal research services. He argued that it is absurd to have a practice that lets an attorney cite a law review note by a law student, but not an opinion of the court itself.

One member noted that some segments of the bar had expressed consternation over non-citable opinions. The law, he said, should be driven by transparency. An important court practice that is not transparent should not be condoned.

Another member acknowledged that some circuit judges fear that "the sky will fall" as a result of the new rule, but argued that there is no empirical support for that fear. The real issue, he said, is not the citation of unpublished opinions, but the precedential effect that opinions have. The revised rule, he emphasized, deliberately does not address the question of the precedential effect of opinions. That is left to each circuit to decide.

Another member emphasized that the rule change is really very simple. It does not address either the meaning or precedential value of unpublished opinions. It merely permits them to be cited to the court.

Another stated that there is a significant distinction between precedential and non-precedential opinions. Judges do not spend time worrying about the precise language of a non-precedential opinion. On some courts of appeals, each precedential opinion is disseminated to the entire court, and each judge has a fixed number of days to comment. The same process does not apply to non-precedential opinions. The main point of an "unpublished" or non-precedential opinion is that the court in a later case does not have to go en banc to disagree with it. The rule change, however, does not affect that practice, for it merely permits lawyers to cite unpublished opinions.

Another member added that he supported the rule change, but thought that its impact might be more significant than anticipated. If, for example, the change were to result in one more hour of judge work per opinion, the total for each judge would be 60 hours a year, a significant amount. Moreover, the rule might cause additional, unnecessary work for the bar.

One member noted that the committee may be perceived as forcing the change on the four circuits that have opposed it. With that in mind, he suggested, it might be better to make the change effective only prospectively. Judge Alito responded, though, that the advisory committee had discussed and rejected that idea.

One member predicted that most of the circuits that currently allow citation of unpublished opinions, but with restrictions, probably would make the rule change retroactive in any event. The idea behind a "prospective-only" change, however, would be to respect the expectations of judges who thought at the time an unpublished opinion was written that it could not be cited back to them as precedent. It might be better, he said, not to force circuits to change the ground rules after the fact.

One member suggested that there is a principled objection to the practice of barring citation of unpublished opinions. If one accepts that principled objection, then to allow a phased transition to permitting citations is simply wrong.

One participant added that a national rule to overturn local non-citation practices had been on the judiciary's agenda for years. Any concern about embarrassment or unfairness to judges incurred by making the rule change retrospective would be *de minimis*. One member stated that he would prefer to have the circuits work out for themselves how to treat prior unpublished opinions. Making the change prospective-only, he suggested, would be a minor nod to the circuits opposing any change.

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

One member suggested that he would move to make the new rule prospective only. But noting a lack of interest, no motion was made.

Judge Levi stated that the new rule itself having been approved, the Standing Committee should turn to consideration of the accompanying committee note. Two members stated that they supported the shorter version of the note. Another agreed, but suggested that the material in the longer version should be disseminated to the public in some form, but not as part of a committee note.

The committee without objection approved the shorter version of the committee note for final approval by voice vote.

FED. R. APP. P. 25 (a)(2)

As noted above on pages 7-8, the committee approved an amendment to FED. R. APP. P. 25(a)(2) (method and timeliness of filing) that would allow a court by local rule to require electronic filing of documents with the court.

Amendments for Publication

FED. R. APP. P. 25(a)(5)

As noted above on pages 4-7, the committee approved for publication a new FED. R. APP. P. 25(a)(5) (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002.

Informational Item

Judge Alito noted that complaints had been expressed by appellate litigants about the briefing requirements imposed by local appellate court rules. He reported that a recent Federal Judicial Center study for the advisory committee had documented a large number of additional briefing and procedural requirements imposed by local rules, some of which are inconsistent with the Federal Rules of Appellate Procedure. The study, he said, had been sent to all the courts of appeals. The advisory committee, moreover, plans to follow up with a letter that will cite the Center study, urge national uniformity, and point out those specific local rules that appear to be inconsistent with the Federal Rules of Appellate Procedure.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 2, 2005. (Agenda Item 8)

Judge Zilly reported that the advisory committee had been consumed with implementing the massive new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that at the time the Act was passed, the Supreme Court had pending before it a proposed amendment to FED. R. BANKR. P. 4008 (discharge and reaffirmation hearing) that would set a deadline for filing reaffirmation agreements. The advisory committee, he said, had reviewed the amendment in light of the legislation and had concluded that it would conflict with the new statute. As a consequence, the Court — at the committee's request and with the concurrence of the Executive Committee — returned the rule for further consideration.

Amendments for Final Approval

FED. R. BANKR. P. 4002

Judge Zilly reported that, following publication, the advisory committee had received a number of comments on revised Rule 4002 (duties of the debtor). The amendments, initiated at the request of the Executive Office for United States Trustees would require the debtor to bring additional documentation to the first meeting of creditors. In addition, he pointed out, the new bankruptcy statute will require changes in the committee's draft.

For these reasons, he said, the advisory committee had decided that the revised rule should not be presented to the Judicial Conference. Instead, the committee will incorporate its substance into a new interim rule for adoption locally by the bankruptcy courts in advance of the effective date of the new legislation (October 17, 2005). Judge Zilly added that it would be very confusing for the Judicial Conference to submit a revised Rule 4002 to the Supreme Court at the same time that many of the same changes are being set out in a new interim rule.

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

FED. R. BANKR. P. 1009

Judge Zilly stated that the proposed amendment to Rule 1009 (amendments to voluntary petitions, lists, schedules, and statements) would require the debtor to submit a

corrected social security number when the debtor becomes aware of an error in a previously submitted statement.

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

FED. R. BANKR. P. 5005(a)(2)

As noted above on pages 7-8, the committee approved an amendment to FED. R. BANKR. P. 5005(a)(2) (filing and transmitting papers) that would allow a court by local rule to require electronic filing of documents with the court.

FED. R. BANKR. P. 5005(c)

Judge Zilly noted that the proposed amendment to Rule 5005(c) (error in filing or transmittal) would expand the list of persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court. The expanded list adds district judges and clerks of the bankruptcy appellate panels.

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

FED. R. BANKR. P. 7004

Judge Zilly explained that the proposed amendment to Rule 7004 (process and service) would require service on the debtor's attorney whenever the debtor is served with a summons and complaint.

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

Amendments for Publication

Judge Zilly explained that the amendments proposed for publication would not be affected by the new bankruptcy statute. He noted that most of them had arisen as a result of the efforts of a joint subcommittee of representatives from both the advisory committee and the Committee on the Administration of the Bankruptcy System.

FED. R. BANKR. P. 3001

Judge Zilly noted that the proposed amendments to Rule 3001(c) and (d) (proof of claim) would add page limits for the filing of a proof of claim or evidence of perfection of a security interest.

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

FED. R. BANKR. P. 3007

Judge Zilly reported that the proposed amendments to Rule 3007 (objections to claims) would prohibit a party in interest from including within an objection to a claim a request for relief that requires the initiation of an adversary proceeding. It would also place restrictions on, and provide procedures for, omnibus objections to claims.

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

FED. R. BANKR. P. 4001

Judge Zilly stated that the proposed amendments to Rule 4001 (relief from the automatic stay, cash collateral, and obtaining credit) would specify the content and service of motions seeking authority to use cash collateral, to obtain debtor-in-possession financing, and to approve related agreements.

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

FED. R. BANKR. P. 6003

Judge Zilly explained that the proposed new Rule 6003 (interim and final relief immediately following commencement of a case) would limit the type of motions and relief that a court may grant during the first 20 days of a case.

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

FED. R. BANKR. P. 6006

Judge Zilly stated that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would place

restrictions on, and provide procedures for, omnibus assumptions, rejections, and assignments of executory contracts and unexpired leases.

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

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed new Rule 9005.1 (constitutional challenge to a statute) would incorporate the new FED. R. CIV. P. 5.1, scheduled to take effect on December 1, 2005, and make it applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

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

FED. R. BANKR. P. 9037

As noted above on pages 4-7, the committee approved for publication a new FED. R. BANKR. P. 9037 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees, with appropriate modifications to meet bankruptcy needs.

Informational Item

Judge Zilly stated that most of the provisions of the new bankruptcy statute will take effect on October 17, 2005. Interim bankruptcy rules, he said, must be in place by that date to assist the courts and the bar. In addition, he noted, the advisory committee has had to modify almost every existing bankruptcy form.

He explained that the advisory committee had identified five major categories of issues raised by the new statute: (1) business; (2) consumer; (3) health care; (4) cross-border proceedings; and (5) direct appeals to the courts of appeals. To reflect these five sets of issues, the committee had created five corresponding working groups, plus a sixth working group to deal with the forms. In August 2005, the committee will meet again to approve the interim bankruptcy rules and the new and revised bankruptcy forms. The rules and forms will then be sent for expedited approval by the Standing Committee and the Executive Committee of the Judicial Conference so they can be in place by October 17, 2005.

He explained that the Official Forms, once approved by the Judicial Conference, must be used in all bankruptcy cases and proceedings. But it will be up to each district to decide whether to adopt the new interim rules. The committee will strongly encourage each district to adopt the rules without change in order to promote national uniformity. He added that public comment would be sought on both the interim rules and the forms, and the advisory committee will use them as the starting point in developing permanent national rules through the normal Rules Enabling Act process. In addition, the actual experience of the courts in using the interim rules can serve as a laboratory to aid the committee's consideration of permanent revisions to the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 27, 2005. (Agenda Item 9)

Amendments for Final Approval

FED. R. CIV. P. 5(e)

As noted above on pages 7-8, the committee approved an amendment to FED. R. CIV. P. 5(e) (filing with the court) that would allow a court by local rule to require electronic filing of documents with the court.

FED. R. CIV. P. 50

Judge Rosenthal stated that the proposed amendments to Rule 50 (judgment as a matter of law) would delete the requirement that a renewed motion for judgment as a matter of law under Rule 50(b) be supported by a motion for judgment as a matter of law made at the close of the evidence. The amendment would allow a renewed Rule 50(b) motion to be supported by any Rule 50(a) motion for judgment as a matter of law made at trial.

Professor Cooper explained that decisional law had long eroded the traditional rule that requires renewal of the motion at the close of the evidence. The gradual erosion, he said, had created a growing uncertainty among practitioners, creating a need for a clear rule to let attorneys know what they have to do. The current rule can be a trap for the unwary and for those who simply forget to renew their motion at the close of the evidence. The few public comments received, he added, generally supported the change.

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

CIVIL FORFEITURE AMENDMENTS

SUPPLEMENTAL ADMIRALTY RULE G
& conforming amendments to
SUPPLEMENTAL ADMIRALTY RULES A, C, and E
FED. R. CIV. P. 9, 14, and 26(a)(1)(E)

Professor Cooper reported that there had been very little public comment on the new Supplemental Admiralty Rule G. He explained that the rule had been developed with the active cooperation of the Department of Justice and the National Association of Criminal Defense Lawyers. It represents the culmination of several years of work by the advisory committee to adapt the admiralty rules to deal better with the great growth that has occurred in civil forfeiture actions and to remove inconsistencies with federal forfeiture statutes.

Many civil forfeiture statutes, he pointed out, explicitly invoke the admiralty rules. There are, however, a number of practical differences between forfeiture actions, on the one hand, and admiralty and maritime actions on the other. Consequently, Rule G establishes distinctive procedures for forfeiture actions within the overall framework of the supplemental rules. It also establishes new provisions that take account of the Civil Asset Forfeiture Reform Act of 2000 and reflects developments in decisional and constitutional law.

Judge Levi stated that these were very beneficial changes that fill a gap in the existing rules. He also observed that Judge H. Brent McKnight, an outstanding member of the advisory committee, deserved great recognition for his important role in chairing the subcommittee that had developed the changes. He noted, with sadness, Judge McKnight's recent untimely death.

The committee without objection approved the proposed new rule and amendments for final approval by voice vote.

ELECTRONIC DISCOVERY AMENDMENTS

FED. R. CIV. P. 16, 26, 33, 34, 37, and 45, FORM 35

Judge Rosenthal explained that the proposed package of rules amendments was intended to address a number of problems that have emerged from the widespread exchange of information in electronic form as part of the discovery process. She noted

that the advisory committee had been asked repeatedly since the early 1990s to consider amendments to tailor the rules more specifically to the realities of discovery in the electronic age.

The committee, she said, had been reluctant to amend the discovery rules at first. Nevertheless, it made considerable efforts to educate itself on the issues by bringing together many people with expertise and differing perspectives at committee-sponsored symposia. As a result of the discussions and debates, the members became convinced that electronic communication was fundamentally different from paper communication by virtue of its volume and changeable quality. In addition, because electronic information may not be intelligible except through the system that created it, difficulties of accessing and deciphering such information can arise that have no counterpart in paper.

Judge Rosenthal reported that the package of proposed electronic discovery amendments had been published in August 2004, and at least 250 public comments had been submitted to the Administrative Office. In addition, the advisory committee had conducted well-attended and vigorous public hearings in San Francisco, Dallas, and Washington.

She noted that electronic discovery rules must take into account the speed and unpredictability of technological change and yet be drafted in a way that is not later made obsolete by new technology. In short, they have to be general enough to survive changes in technology, but specific enough to provide meaningful guidance to judges, lawyers, and clients.

Judge Rosenthal explained that the proposed electronic discovery amendments can be grouped into five categories:

1. *Encouraging early attention to electronic discovery issues*
2. *Protecting claims of privilege*
3. *Defining interrogatories and requests for production*
4. *Discovering electronically stored information that is not reasonably accessible*
5. *Protecting parties against sanctions when information is lost through the routine operation of an electronic system*

1. Encouraging early attention to electronic discovery issues

FED. R. CIV. P. 16(b), 26(a), and 26(f), FORM 35

Judge Rosenthal pointed out that discovery of electronically stored information requires more management and communication than discovery of paper documents. More decisions must be made at an earlier stage of litigation, both by the attorneys and the court. Professor Cooper added that as electronic discovery issues become more complex, it becomes critical for parties and the court to focus on them at the outset of the litigation.

The proposed amendments, therefore, call on the parties themselves to discuss technical issues relating to the exchange and preservation of discoverable electronic information. Revised Rule 26(f) (conference of the parties) directs the parties to discuss discovery of electronically stored information during their discovery and planning conference. Revised Rule 16(b) (scheduling and planning), in turn, alerts the court to the need, in appropriate cases, to address in its scheduling order potential problems regarding the discovery of electronically stored information.

Professor Cooper explained that some had voiced concern that flagging electronic discovery issues in the rule would serve as an invitation to parties to ask the court for preservation orders, increasing the burdens and costs that flow from overbroad preservation orders. For this reason, he said, a paragraph had been added to the committee note following publication warning that courts should not routinely enter preservation orders. It states, moreover, that courts should issue *ex parte* preservation orders only in "extraordinary circumstances."

One participant observed that the language of the draft note may be substantive in nature — though the rule amendment itself is not — because it suggests that the parties' agreement on a procedure for asserting privilege and protection claims will protect them against the risk of privilege waiver. Judge Rosenthal responded that the note does not promise any substantive outcome. It merely points out that one purpose of an agreement by the parties is to have them address specifically the potential problems associated with inadvertent production of work product or privileged information. She suggested that the note could be changed to make clear that it addresses only agreements between the parties and does not intend to preclude waiver issues as to third-parties not present in the litigation.

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

2. Protecting claims of privilege

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that enormous problems exist in screening discovery materials to detect privileged and protected items. Parties worry about waiving privilege as to all information pertaining to the subject matter, not merely as to the specific item produced, particularly as to third parties. Thus, he said, there is widespread interest in having the committee devise an effective rule governing discovery and privilege agreements. But there is also a recognition that the rules cannot address the substantive law of privilege without express Congressional approval.

One practical problem, he said, is that a party may produce a good deal of electronic information in response to a discovery request and then realize that some of the information it has turned over may be privileged. The risk of such production is greater with electronic information than with paper, because of the volume and the dynamic nature of the information, and because the way it is stored may make privilege review more difficult.

The new rule would provide a defined procedure for the producing party to raise the privilege issue and recover the pertinent material. But it does not touch the substantive questions of what is privileged nor what the scope of the waiver may be. To invoke the new procedure, the producing party must give notice of the privilege claim to the receiving party. The receiving party must stop using the described material, and must take reasonable steps to retrieve it if it has been disclosed to third parties, pending resolution of the issue. The proposed rule would allow the receiving party to submit the material to the court under seal and obtain a ruling on privilege and waiver.

One member noted that the amendment specifies that the receiving party may not use the information for "any" purpose until the court resolves the issue of privilege. The language could be read to mean that the receiving party could not even use the information for the purpose of arguing against the privilege.

A participant responded that states differ on whether a receiving party may discuss the document in question for purposes of litigating the privilege issue. Another stated that the law is very confused on these points, varying from district to district and from state to state, and it is not for the rules committees to sort out all the problems.

One member remarked that once a third party has received a privileged document and has notice that the court is considering the privilege question, it should be bound by the court's decision on the matter. He added that it may be unclear whether the court has

jurisdiction to bind a non-party, but non-parties at least can be notified that a party has asserted a privilege.

One member observed that third parties beyond the control of the court can do whatever they want until they are given notice that the privilege has been claimed or determined. But once they receive notice, ethical obligations attach to restrict their conduct if they are attorneys. One participant objected that the rule seemed to be an attempt, through the guise of procedure, to impose a substantive obligation on third parties.

Judge Rosenthal acknowledged the difficulty of these thorny issues, but stated that the committee simply cannot fix all the problems. All that the amendment attempts to do, she said, is to put in place an orderly and consistent procedure for the parties, recognizing that the problem is likely to occur more frequently with electronic discovery. It is not intended to put a thumb on the substantive scales in deciding whether there has been a waiver of privilege or not.

One member voiced serious reservations about dealing with privilege problems by rule, arguing that the amendment could lead to disruption of civil litigation. For example, it does not set a time deadline for asserting a claim of privilege, and its procedure is not limited to electronic discovery or to voluminous materials. Moreover, it does not change the substantive law of waiver, so parties will still have to go through the laborious process of examining all documents before they are turned over in order to protect work product and avoid disclosing privileged information. He suggested a scenario where a party dumps 10,000 documents on the other party. Three months later, the receiving party attempts to use the documents to depose a witness. Suddenly, the producing party proclaims: "Wait a minute! I claim privilege. You cannot use this particular document. The deposition must stop until the court rules on my privilege claim." Thus, he concluded, the revised rule could lead to more intractable, expensive, and unpredictable litigation.

He acknowledged the advisory committee's assertion that the amendment is nothing more than a procedure for prompt determination of privilege claims. But, he argued, if that is all it is, existing Rule 26(b)(5) is sufficient. In practice, he said, attorneys normally negotiate privilege issues and present them to the court only when they cannot agree. Thus, privilege questions are raised with the court at the time the documents are produced, not months or years later. The new procedure, he said, will cause unanticipated problems by creating a second, parallel procedure for addressing privilege problems.

A member responded that the amendment should include a specific reference to the inadvertent production of documents and the need to raise privilege issues in a timely

fashion. It could say that the asserting party must declare that the production was inadvertent and raise the issue within a reasonable time. He also said that discovery is a two-way street, pointing out that he had never seen a case in which only one side had inadvertently produced a privileged document. The amendment, he said, was aimed at production of voluminous information, and it is sorely needed in cases with large amounts of discovery materials.

Judge Rosenthal added that all these concerns had been discussed by the advisory committee. In most jurisdictions, she said, the existence of a waiver of privilege turns on whether the claim of privilege has been timely asserted. Thus, the asserting party has every incentive to raise the issue of privilege as soon as it arises, rather than delay and increase the risk that a court will find waiver.

She agreed that the concerns addressed by the amendment are not limited to discovery of electronic information. The concerns, though, are more acute with electronic discovery because privileged information is more likely to escape detection in privilege review.

Judge Rosenthal emphasized that the committee cannot change the substantive law of privilege and privilege waiver. Once privileged information is released, the asserting party must consider its options under governing substantive law. The rules committee, she said, cannot address that problem, and the amendment merely establishes a procedure for raising the issue in the district court.

One member stated that all agree that the amendment does not affect the substantive law of waiver and will not eliminate the expenses flowing from the substantive law. But, he claimed, it will change the litigation environment, for some attorneys will use it to delay and disrupt the process and engage in gamesmanship. It will give unscrupulous attorneys the ability to claim that a particular document is privileged and cannot be used by the other side until they obtain a court ruling. The amendment, he said, will create a totally open-ended procedure.

Judge Levi stated that the Advisory Committee on Evidence Rules had on its agenda the drafting of a statute on the substantive law of privilege waiver for possible submission to Congress. One option, he said, would be to hold up the proposed discovery rule for a year and allow the evidence committee to catch up.

Judge Rosenthal stated her concern about the timing and the uncertainty of any effort that depends on Congressional action. In any event, she did not see how a potential statute on substantive privilege waiver would be inconsistent with the pending rule amendment, which is purely procedural and addresses a real and present problem.

One member stated that the amendment may cause some confusion, and the parties will still need to sift through documents before releasing them. Therefore, the key question is whether the amendment will add any value to the discovery process. Others responded that the rule will tighten up current practice to make it more routine and mandatory. It also makes it clear that the receiving party cannot freely use a challenged document.

One participant objected that the amendment places the burden on the receiving party to show that a document is not privileged. Instead, he said, the burden should be on the releasing party to show privilege. Judge Rosenthal explained that the amendment effects no shift in the burden. The asserting party notifies the receiving party of the basis for the claim of privilege. Then the receiving party has to go to court if it wants to use the document. The party asserting the privilege stills bear the burden of proving the basis for the claim of privilege. One member responded that there may still be some burden-shifting as a practical matter because the receiving party must initiate the contest by bringing the matter to the court.

Judge Rosenthal observed that this is the way smart attorneys handle these problems now. The amendment, a modest proposal, simply codifies good practice. The public comments, she said, had convinced the committee that although the amendment does not do a great deal, it certainly does enough to make it worthwhile.

One member stated that the existing system works well because a receiving party knows that it will want the same treatment at a later time when it becomes an asserting party. Good lawyers, thus, have an interest in maintaining the integrity of the discovery process. No asserting party, he added, will attempt to claw back a document unless the document is very important and the claim of privilege is serious.

One participant suggested that the rule should not speak about the "inadvertence" of production, but instead require the asserting party to specify all the steps that it has taken to guard against inadvertent production. Judge Rosenthal responded that the law already requires that effort as part of the substantive showing that a waiver of privilege has occurred.

Judge Levi noted that the amendment had been uncontroversial during the public comment period.

The committee, by a vote of 8 to 4, approved the proposed amendment for final approval.

3. Defining interrogatories and requests for production

FED. R. CIV. P. 33 and 34

Judge Rosenthal reported that the advisory committee had received very little comment on the proposed amendment to Rule 33 (interrogatories), which makes clear that the option to produce business records — or make them available for examination, audit, or inspection — includes electronically stored information.

The proposed amendment to Rule 34 (production of documents) would add "electronically stored information" as a separate category subject to production, apart from "documents." Judge Rosenthal explained that an initial issue surrounding the amendment to Rule 34 was whether electronic information should be included as a subset of "documents," or as a new category in addition to "documents." The advisory committee had opted for the latter.

She noted that courts effectively have shoehorned all sorts of information into the elastic term "documents." But, she said, it is difficult to fit all forms of electronically stored information, many of which are dynamic in nature, within the traditional concept of a "document." In addition, the amendments make it clear that electronic information is different in kind and needs special attention, and they facilitate the rules providing distinctive treatment when appropriate.

The amendment to Rule 34(b) (procedure for production) sets out a procedure for parties to deal with the form in which electronic information is produced. The request may specify a form or forms for producing electronically stored information. The responding party may object. Even if the request does not specify a form, the responding party cannot simply produce materials in a way that presents unnecessary obstacles to review. Rather, it must produce the information requested either in the form or forms in which it is ordinarily maintained or in a form or forms that are "reasonably usable." Moreover, a party need not produce the same electronically stored information in more than one form.

The language of the amendment, she noted, uses the terminology "form or forms" because the committee did not want to suggest that all materials must be produced in the same form. Parties may agree that some information will be produced in one form, other information in another form. She noted, though, that the Style Subcommittee would prefer not to use the terminology "form or forms," because the applicable style conventions specify that the singular of a term incorporates the plural. Judge Levi suggested that Judge Rosenthal work with Judge Murtha, chair of the Style Subcommittee, to work out the precise language as part of the Style Project.

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

4. Discovering electronically stored information that is not reasonably accessible

FED. R. CIV. P. 26(b)(2)(B)

Judge Rosenthal stated that electronic information is often stored on sources that make it difficult to retrieve. If so, the information is not "reasonably accessible" because of the burdens and costs involved in retrieving it. By way of examples from current technology, information may be stored only on backup tapes that are not organized or searchable, and legacy data from obsolete systems may only be captured by recreating those systems.

She explained that sophisticated parties look first at what information is reasonably available. Often that is enough to satisfy the legitimate needs of the litigation. But if it is not sufficient, they will appraise the burdens and costs of looking further, balanced against the potential value of the information sought, and consider whether to incur those burdens and costs and, if so, how best to allocate them. The amendment seeks to provide guidance and structure to this effort.

She noted that many public comments had asserted that the draft rule is not clear enough as to what is meant by "not reasonably accessible" and what constitutes "good cause." As a result, the advisory committee, following publication, had clarified the rule by defining "not reasonably accessible" in terms of undue burden and cost. The advisory committee had also clarified the showing that a party must make to establish "good cause" for production of inaccessible information by tying it to the limitations set forth in Rule 26(b)(2)(C). Professor Cooper added that technical experts normally use the adjective "accessible" and the verb "to access," and that is one reason the committee chose the term "accessible."

Judge Rosenthal explained that the rule is intended to be a tool for discovery management. Electronic discovery requires special management and supervision by the court in ways that paper discovery usually does not. She noted that people generally expect that electronic information will be cheaper to access, but producing some electronic information can be extremely expensive.

She emphasized that the rule is not one of presumed non-discoverability, but instead makes the existing proportionality limits more effective in a novel area in which the rules can helpfully provide better guidance. In addition, the committee note clarifies that nothing in the amendment undermines or reduces existing preservation obligations under the rules or the common law. In a nutshell, the amendment in no way encourages or permits parties to bury evidence.

One member emphasized that the amendment does not relieve the producing party of any obligation it would otherwise have to preserve data. The rule, deliberately, does not affect that obligation, and it should not. Another member objected, though, that the last sentence of the fourth paragraph of the note addresses the rule's effect on a party's preservation obligation. Judge Rosenthal agreed to delete the sentence.

One member recommended that the note set forth some concrete examples of electronic information that is not reasonably accessible, even though the examples might soon become outdated. Professor Cooper responded that the committee had received testimony from computer experts that if the committee were to give concrete examples, it would not be long before they would become not only obsolete, but also misleading. As one example, he said, it used to be very expensive to search backup systems, but that is not necessarily that case today.

A member stated that the real problem is not the cost of providing discovery. The current rules, he said, already address that matter. What the amendment adds is an explicit recognition that the additional costs of searching sources that are not readily accessible may be unnecessary because the information to be retrieved will not make much difference. Thus, the amendment allows the relevance of information to be determined as a case proceeds.

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

5. *Protecting parties against sanctions when information is lost through the routine operation of an electronic system*

FED. R. CIV. P. 37(f)

Judge Rosenthal explained that inadvertent destruction is more likely to occur with electronic information than with paper records. Electronic systems typically automatically overwrite, discard, or filter information without conscious human intervention. Individuals may not be aware that particular records have been eliminated. This is an inherent feature of electronic systems. But it poses a great risk for companies facing regular litigation because they may be subjected to sanctions for unintentionally losing relevant information. She said that there is an acute need to provide guidance and some kind of protection for litigants when information is deleted as part of the routine, good-faith operation of their automated business systems.

She pointed out that defensive over-preservation of records for potential discovery purposes also has its costs. In addition to the costs of storage, the parties have to review substantially more information. What is needed is a rule that neither over-protects nor

under-protects parties in storing their records on electronic systems. The rule, she added, cannot enact substantive standards for preservation, but it should protect a party from sanctions if information is lost due to routine operation of its electronic system.

She reported that the advisory committee had received a great deal of public comment on this difficult issue. Some comments objected to using a negligence standard in the rule because it would only protect those parties that would not be sanctioned anyway because they were not negligent. On the other hand, if sanctions were available only for intentional or reckless failure to preserve, the rule might preclude sanctions in situations where courts might consider them appropriate.

She noted that the term "good faith" in proposed Rule 37(f) (sanctions) was a deliberate choice of the advisory committee. A party will not face sanctions if it loses information due to the "routine, good-faith operation of an electronic system." Thus, protection exists only if the operation of the system is "routine," and not where information has been specifically targeted for deletion. Moreover, with the "good faith" requirement, a party does not have a license to thwart discovery by sitting back and knowingly letting discoverable information be deleted by the routine operation of a computer system. The protection provided by the amendment is geared to situations where a party simply does not realize that discoverable information will be lost.

Judge Rosenthal added that the advisory committee had considered whether it was necessary to republish the amendment because the current language differs from what was published. But the committee had decided against republication because it had already received all the benefits that public comment is intended to provide. The public comments had thoroughly addressed the issues.

One member objected that the amendment appeared to imply that as long as a party acts in good faith, it has no duty to preserve information that will be lost routinely, even though the party knows it faces litigation or is actually in litigation. Judge Rosenthal and Professor Cooper responded that the amendment does not attempt to define the independent preservation obligations of parties. It simply limits the imposition of sanctions under specified conditions.

One participant objected that the word "routine" should be deleted from the amendment. Once litigation is initiated or a preservation order is entered, life is no longer "routine" for a party holding discoverable information. Judge Rosenthal responded that the complete phrase is "routine operation." The two words go together. What is "routine" is the operation of the electronic system, operating according to criteria not tied to particular litigation.

One member said that the advisory committee was very wise in attempting to provide a safe harbor for the routine, good-faith operation of electronic systems. He emphasized that companies need practical guidance on this issue, as they need to know when to put a "litigation hold" on some part of their electronic systems. But, he said, the text of the committee note may be inconsistent with the rule itself in discussing the imposition of sanctions in exceptional circumstances, even when information is lost as a result of routine, good-faith operations. Others suggested deleting the note's discussion of sanctions to remedy prejudice and sanctions to punish or deter discovery conduct.

One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers "severe prejudice." Another added that the distinctions between remedial and punitive sanctions are not as explicit as they could be, and the concept of "good faith" is asked to carry a good deal of weight.

A member said that one important merit of the amendment is that it does not attempt to address specifically the different types of situations that may occur: (1) before the litigation, (2) after the litigation is brought, and (3) after the issuance of a preservation order. Instead, it speaks generally of good faith and gives parties flexibility and leeway. In essence, he said, the rule does not provide a complete safe harbor. A party cannot remain ignorant and be confident that it is operating in good faith. And once a company faces a preservation order and does not direct a litigation hold, it presumably is not acting in good faith. Yet the amendment cannot be more explicit and do more because it might modify common-law substantive obligations to preserve information.

Another member added that the amendment makes it clear, though, that a party has no duty to vary its regular business practice, as long as it adheres to that practice in good faith.

Judge Rosenthal responded that the rule had been very difficult to draft because the jurisprudence and terminology in this area are not crisp. Court opinions often label as "sanctions" a wide range of actions not normally considered to be "sanctions." Judges, for example, may describe routine discovery management orders as "remedial sanctions." The rule seeks to preserve judges' discretion to respond effectively to a wide range of circumstances and is only intended to foreclose the imposition of "real" sanctions. She added that the proposal is more like a "protective coat" than a "safe harbor."

Professor Coquillette added that the amendment only precludes sanctions "under these rules." That permits the court to impose sanctions under other sources of authority. But several members observed that it is unclear that anyone will catch that subtlety. Therefore, they said, the note needs to be more explicit on the matter.

Judge Rosenthal responded that in light of the concerns expressed, she would support redrafting appropriate portions of the committee note.

Dean Kane moved to adopt the amendment, delete the portions of the committee note that were troubling some of the members, and add language to the note emphasizing that the rule refers only to sanctions "under these rules."

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

FED. R. CIV. P. 45

Judge Rosenthal explained that the proposed amendments to Rule 45(d)(2)(B) (subpoenas) would apply the proposed amendments dealing with electronically stored information to discovery requests aimed at non-parties. One member objected that the part of the proposed amendments to Rule 45(d)(2)(B) dealing with the inadvertent disclosure of privileged material is not an electronic discovery rule, but a privilege rule — a counterpart to proposed Rule 26(b)(5). Therefore, the same objections raised to proposed Rule 26(b)(5) would apply to Rule 45. He added that the full implications of the new procedure established by the amendments had not been fully explored.

Judge Levi pointed out that, following the discussion of Rule 26(b)(5), the committee had rejected these objections by a vote of 8 to 4. That vote, he said, apparently would apply to Rule 45 as well.

Judge Murtha moved to reconsider the vote as to both Rule 26(b)(5) and Rule 45.

The committee, by a vote of 7 to 5, agreed to reconsider the proposed amendment to FED. R. CIV. P. 26(b)(5) as part of its consideration of the proposed amendment to FED. R. CIV. P. 45.

One member stated that the proposed amendments do not explicitly recognize the substantive principles of waiver. He suggested that language be added to explain that the rule does not change the applicable substantive principles of waiver. It could also specify that a party seeking to preserve a claim of privilege is not relieved of any evidentiary burden it has under substantive law. Another member added that even if it is clear that the burdens as to waiver are unaffected, the amendments offer an opportunity for gamesmanship in the discovery process.

Judge Rosenthal reiterated that it is clear that the amendments do not displace any burdens under the substantive law of privilege and waiver. Whatever opportunity there may be for gamesmanship, *i.e.*, for a party to assert privilege claims at a time calculated

to disrupt the litigation, already exists under the current rules. All the amendments do is provide a procedure for addressing a wide variety of situations. In effect, if a receiving party receives a privileged document, it has a club. The amendments state that the receiving party cannot use that club, but instead must bring the matter to the attention of the court.

Judge Thrash moved to remand the two amendments to the advisory committee for further consideration.

The committee, by a vote of 6 to 5, rejected the motion to remand the amendments to the Advisory Committee on Civil Rules.

The committee, by a vote of 9 to 3, approved the proposed amendments for final approval.

Amendments for Publication

FED. R. CIV. P. 5.2

As noted above on pages 4-7, the committee approved for publication a new FED. R. CIV. P. 5.2 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Rosenthal reported that the style project was progressing very well. She noted that a number of law professors and attorneys had agreed to review the restyled rules, provide comments, and focus on whether any unintended changes in substance have been made.

The Style Subcommittee, she said, had made great progress in restyling the civil forms. It plans to circulate them to the Standing Committee later in the summer and ask for approval to publish them. As a result, the advisory committee will be able to receive public comment simultaneously on both the restyled rules and the restyled forms.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew, Professor Schlueter, and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum of May 17, 2005. (Agenda Item 10).

Amendments for Final Approval

Judge Bucklew reported that the advisory committee had received only two public comments on the amendments it had published in August 2004, three of which would authorize warrants and certain other documents to be transmitted by "reliable electronic" means.

FED. R. CRIM. P. 5

Judge Bucklew noted that the proposed amendment to Rule 5 (initial appearance) would permit a magistrate judge to accept a warrant from law enforcement authorities by reliable electronic means.

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

FED. R. CRIM. P. 6

Judge Bucklew explained that the changes to Rule 6 (grand jury) did not have to be published for public comment because they are merely technical and stylistic. They conform statutory language added by the Intelligence Reform and Terrorism Prevention Act of 2004 to the language used in the rest of the criminal rules.

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

FED. R. CRIM. P. 32.1

The proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) would allow a magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means.

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

FED. R. CRIM. P. 40

The proposed amendment to Rule 40 (arrest for failing to appear in another district) would fill a perceived gap in the rules regarding persons arrested for violating the conditions of release in another district. It would specify that a magistrate judge in the district of arrest may set conditions of release.

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

FED. R. CRIM. P. 41

The proposed amendment to Rule 41 (search warrant) would authorize a magistrate judge to use reliable electronic means to issue a warrant.

Judge Bucklew stated that a separate amendment to Rule 41 would provide procedures to assist magistrate judges in issuing warrants for tracking devices. The proposal, she added, had been approved by the Standing Committee in June 2003, but not submitted to the Judicial Conference because the Department of Justice had asked for more time to consider it. She pointed out that the Department had now completed a further review of the amendment and had no further recommendations. Accordingly, she said, the amendment should now be forwarded to the Conference.

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

FED. R. CRIM. P. 58

The proposed amendment to Rule 58(b)(2) (initial appearance in a misdemeanor) sets out the advice that a magistrate judge must give at an initial appearance on a misdemeanor charge. It would eliminate a conflict with Rule 5.1(a) (preliminary hearing) regarding the defendant's entitlement to a preliminary hearing.

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

Amendments for Publication

Judge Bucklew stated that the proposed amendments to Rule 11 (pleas), Rule 32 (sentence and judgment), and Rule 35 (correcting or reducing a sentence) are needed to bring the criminal rules into conformity with the Supreme Court's recent decision in *United States v. Booker,* 125 S. Ct. 738 (2005), which makes the federal sentencing

guidelines effectively advisory. She added that the advisory committee had made only those changes deemed absolutely necessary in light of *Booker*.

FED. R. CRIM. P. 11

Judge Bucklew stated that the proposed amendment to Rule 11 (pleas) is consistent with the sentencing practice followed by most district judges after *Booker*. It would impose an obligation on a sentencing judge to calculate the applicable sentencing guideline range and to consider that range, possible departures under the guidelines, and the other sentencing factors set out in 18 U.S.C. § 3553(a).

Judge Levi stated that the amendment is consistent with his reading of the remedy section of *Booker*. He noted that if a sentencing judge does not actually calculate the guidelines sentence, the Sentencing Commission will report the case to Congress as a non-guidelines sentence. One participant added that if the sentencing judge does not calculate the guidelines sentence, the judge does not know what the guidelines would dictate and therefore cannot be said to have "considered" the guidelines.

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

FED. R. CRIM. P. 32

Judge Bucklew explained that the amendments to Rule 32 (sentencing and judgment) reflect the urging of the Committee on Criminal Law that district judges use a uniform statement of reasons form to explain their sentencing decisions, so that reliable statistics can be presented to the Sentencing Commission and Congress. It also makes clear that a judge may instruct the probation office to gather and include in the presentence report any information relevant to the sentencing factors articulated in 18 U.S.C. § 3553(a). And it requires the court to give the parties notice if it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence.

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

FED. R. CRIM. P. 35

Judge Bucklew noted that the proposed amendment to Rule 35 (correcting or reducing a sentence) is needed to avoid the present implication in the rule that a guidelines sentence is mandatory.

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

FED. R. CRIM. P. 45

Judge Bucklew stated that the proposed amendment to Rule 45 (computing and extending time) would adjust the time-counting provision of the rule to conform more closely with the equivalent provision in the civil rules, FED. R. CIV. P. 6(e) (additional time after service). It would remove any doubt about how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, by electronic means, or by other means consented to by the party served.

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

FED. R. CRIM. P. 49.1

As noted above on pages 4-7, the committee approved for publication a new FED. R. CRIM. P. 49.1 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The amendment fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Bucklew described a proposed amendment to FED. R. CRIM. P. 29 (motion for a judgment of acquittal), urged by the Department of Justice, that would require a court to defer ruling on a motion for judgment of acquittal until after the jury returns a verdict. She noted that the Department had submitted additional materials recently, and the advisory committee had considered a revised draft rule at its April 2005 meeting. The current version follows a proposal suggested by Judge Levi that would allow a defendant to consent to an appealable pre-verdict ruling conditioned upon waiving double jeopardy rights.

Judge Bucklew said that a majority of the committee at the April meeting had voted in favor of making some change in the rule. But drafting a rule had been very difficult, particularly with regard to hung juries and waiver of double jeopardy rights. She added that a subcommittee was working on polishing a rule and a committee note that would be considered at the committee's October 2005 meeting.

She pointed out that the Crime Victims' Rights Act had been signed into law in October 2004. The advisory committee, she reported, was in the process of reviewing the

full body of criminal rules to determine which might be affected by the statute and have to be amended.

Judge Bucklew reported that the American College of Trial Lawyers (ACTL) had submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense under *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), and other Supreme Court cases. The committee had reviewed all the local district court rules on the subject, some of which attempt to codify *Brady* and define the government's disclosure obligations. She said that a majority of the committee had voted in favor of proceeding with some amendment to FED. R. CRIM. P. 16 (discovery and inspection).

Deputy Attorney General Comey stated that the Department of Justice was very strongly opposed to the proposal. He said that prosecutors already are required to disclose exculpatory evidence under *Brady*, and they err on the side of production. The Department instructs prosecutors that they have a firm obligation to disclose. Prosecutors, he emphasized, act properly, and the defendant's right to a fair trial is protected.

Most of the suggestions, he said, go well beyond constitutional requirements and would create new rights that the courts have refused to recognize. One likely result of the proposed rule would be unnecessary pretrial disclosure of the identity of government witnesses. The change could create unintended consequences that everyone, not just prosecutors, will regret. Under the ACTL proposal, he pointed out, the government would have to bear the burden in every case of showing that it has turned over all evidence that "tends" to be exculpatory. This, he said, is an impossible burden.

He observed that ACTL had catalogued a number of successful *Brady* challenges, but most of them had occurred in the state courts. There is no point in changing a federal criminal rule in order to address reported lapses by state prosecutors. He admitted that the few errors committed by federal prosecutors were not enough to justify a rule change. If there were a problem, the Department of Justice could place more specific guidance for prosecutors in the U.S. Attorneys' Manual.

In short, he concluded, the current system is not broken, and no rule amendment is justified. Moreover, the proponents of the rule have not carried the burden of establishing that a problem exists to justify such a fundamental change.

On that point, one member inquired as to whether any actual empirical data existed, beyond case decisions, as to how significant the problem of non-disclosure might be. Without a sounder empirical basis, the rationale for the proposed rule is weak. But

another participant responded that the *Brady* case decisions arise in circumstances where the exculpatory evidence, one way or another, ultimately is revealed. On the other hand, there is little information available regarding the instances in which relevant exculpatory information never comes to light. Those cases are not litigated and cannot be detected.

Another member observed that the proposed national rule is more modest than the local rules that currently exist in about a third of the federal district courts. Accordingly, if the local court rules have not caused problems, there should be no problem with a national rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 16, 2005. (Agenda Item 11)

Amendments for Final Approval

FED. R. EVID. 404(a)

Judge Smith stated that there has been a long-standing conflict among the circuits as to whether character evidence may be used to prove conduct in a civil case. The proposed amendment to Rule 404(a) (general inadmissibility of character evidence) would make it clear that character evidence should not be admitted for this purpose in a civil case.

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

FED. R. EVID. 408

Judge Smith stated that the proposed amendment to Rule 408 (compromise and offers to compromise) would allow conduct or statements made in compromise negotiations to be admitted in later criminal cases under certain limited circumstances. He pointed out that the Department of Justice had sought the amendment.

Professor Capra observed that the current case law is in disarray, and there is no certainty for an attorney as to what will be disclosable and useable in this area. The amendment, he said, is a compromise that should provide some certainty by making a limited exception for statements made to civil regulatory agencies to settle claims brought by them.

Associate Deputy Attorney General Davis stated that the Department of Justice supported the amendment in concept. He argued that people ought to know that what they say to the government is on the record and that they can be held responsible for lying.

He added, however, that the amendment's reference to a government regulatory agency was too vague and limiting. He suggested language along the lines of "a claim by or against a public office or agency exercising public regulatory or enforcement authority." He noted that the phrase "public office or agency" is used already in Rule 803 (hearsay). Under this language, if a government agency acts like a private party, contacts with it are treated as private conversations. The exception established by the proposed amendment would apply only when the public entity exercises public, *i.e.*, regulatory or enforcement, authority. This is a distinction that the current version of the amendment does not address.

Judge Smith stated that he supported the proposed new "public office or agency" language, but opposed the additional suggestion that the amendment be broadened to extend the exception to claims brought either "by" or "against" a government agency. He stated that claims against a government agency should not be included. Individuals should be able to sue the government for various reasons without having to worry that if they settle their claim, something they say in settlement negotiations could be used against them in a later criminal matter.

Judge Levi stated that attorneys in some private cases urge their reluctant clients to apologize just to get a case to go away. There is no way that clients will do that if their statements can be treated as an admission of guilt in a later criminal case. Therefore, the proposed amendment is limited to statements made in connection with claims brought by the government. In those claims, there is a sense that a party is on notice that what it says to the government can be used against it.

Professor Capra suggested — and the committee accepted — the following revised language: "a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

The committee, by a vote of 8 to 2, approved the proposed amendment for final approval.

FED. R. EVID. 606(b)

Judge Smith stated that Rule 606(b) (inquiry into the validity of a verdict or indictment) generally prohibits parties from introducing testimony or other evidence from jurors to impeach a jury's verdict. But some courts have permitted jurors to testify as to

the intent of their verdict. This, he said, should lie beyond the reach of the rule. The amendment, therefore, would limit inquiries of jurors to proving that the verdict reported was the result of a mistake in entering it on the verdict form. The amendment, thus, would make it clear that a juror cannot testify about the intended effect of the verdict.

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

FED. R. EVID. 609

Judge Smith stated that the proposed amendment to Rule 609 (impeachment by evidence of conviction of a crime) would address the portion of the rule that admits evidence of a prior criminal conviction if the crime involved "dishonesty or false statement." The key question is how the court is to determine whether the crime involved dishonesty or false statement. It would be undesirable, he explained, for a court to get bogged down on this determination, or to hold a mini-trial to consider the terms of a past crime. Accordingly, the proposed language would admit evidence of a prior conviction "if it can readily be determined" that the crime involved dishonesty or false statement.

Deputy Attorney General Comey voiced support for the rule and the committee note. He noted that the point of the amendment is to allow a court to look beyond the formal elements of the crime itself to the actual offense committed. He said that mini-trials on this issue would be inappropriate, but some license should be provided to a court to delve beyond the mere elements of the crime.

For this reason, however, Mr. Comey objected to the language "as proved or admitted" contained in the proposed amendment. He suggested that it could cause confusion. Judges might read it to mean that they are limited to considering only the formal elements of the crime. Yet the whole point of the rule change is to allow them to go beyond that.

Professor Capra suggested that the problem could be solved by adding the word "establishing" to the amendment, so that it would read: "evidence that any witness has been convicted of a crime shall be admitted . . . if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement." The committee accepted the revised language.

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

NEXT COMMITTEE MEETING

The next committee meeting was tentatively scheduled for Friday and Saturday, January 6-7, 2006, in Phoenix, Arizona.

The secretary would like to thank Jeffrey Barr very much for his invaluable assistance in preparing a draft of the minutes of the meeting.

Respectfully submitted,

Peter G. McCabe,
Secretary

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 15, 2005

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Nineteen bills were introduced in the 109th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Civil Rule 11

On January 26, 2005, Representative Lamar Smith (R-TX) introduced the "Lawsuit Abuse Reduction Act of 2005" (H.R. 420, 109th Cong., 1st Sess.). The legislation is similar to an earlier bill, which was passed by the House of Representatives during the last Congress in September 2004 (H.R. 4571, 108th Cong., 2nd Sess.). H.R. 420 would, among other things: (1) reinstate sanctions provisions deleted in 1993 from Civil Rule 11 and require a court to impose sanctions for every violation of the rule; (2) require a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney had violated Rule 11 three or more times; and (3) alter the venue standards for filing tort actions in state and federal court. Two new provisions were approved on the floor of the House. The first provides enhanced sanctions for anyone who "influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede" a pending federal court case through the willful and intentional destruction of documents that are "highly relevant" to the case. The second prohibits a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety. Both provisions are ambiguously worded.

Although ostensibly limited to a Rule 11 proceeding, the bill goes on to say that the "section applies to any record formally filed with the court." The provision bears some resemblance to "sealed settlement" legislation, which was introduced in past Congresses by Senator Herb Kohl ("Sunshine in Litigation Act of 2003," S. 817, 108th Cong., 1st Sess.). In fact, Representative Jerrold Nadler, the amendment's author, explained that the "amendment bans the concealment of unlawful conduct when the interests of public health and safety outweigh the interest of litigating parties in concealment. Very often in civil litigation, a company producing an unsafe product or an unsafe procedure will settle with the plaintiff. The settlement will

include a payment to the defendant, but will also include an agreement that the records will be sealed and no one will ever talk about it. That is the very condition that the defendant company puts on it . . . . When it comes to public health and safety, people must have access to information about an unsafe product . . . . Secrecy agreements should not be enforced unless they meet stringent standards to protect the public interest and public health." The House passed the bill on October 27, 2005, by a vote of 228-184. The Senate has not yet acted on the legislation.

Earlier this year, at the request of the Civil Rules Committee, the Federal Judicial Center conducted a survey of 400 district court judges on Civil Rule 11 and H.R. 4571. Seventy percent of the judges surveyed responded. Of the judges who responded, 87 percent preferred the current version of Rule 11, only 5 percent preferred the version of the rule in effect between 1983-1993, and 4 percent preferred the rule version as proposed by the legislation. (The survey is available on the Federal Rulemaking web site at <www.uscourts.gov/rules/newrules10.html>.) On May 17, 2005, Director Mecham sent letters, which enclosed the FJC report, to Chairman James Sensenbrenner and Chairman Arlen Specter, urging them to oppose H.R. 420.

Habeas Corpus

On May 19, 2005, Senator Jon Kyl (R-AZ) introduced the "Streamlined Procedures Act of 2005" (S. 1088, 109th Cong., 1st Sess.). A similar, but not identical, bill was introduced by Representative Dan Lungren on June 22, 2005 (H.R. 3035, 109th Cong., 1st Sess.). The bills generally limit federal habeas corpus review of state court convictions in capital and non-capital cases.

The Senate Judiciary Committee held hearings on S. 1088 on July 13-14, 2005. On July 28, 2005, the Committee adopted a substitute amendment offered by Senator Arlen Specter (R-PA). The substitute amendment deleted several provisions of the bill, as introduced, that had been of concern to some of the witnesses. On October 6, 2005, Senator Specter offered a second substitute amendment, which was approved by the Committee by a vote of 10-1. An amendment offered by Senator Feinstein was defeated along party lines by a vote of 8-10 that would have required the Judicial Conference to conduct a study of the handling of capital and non-capital habeas cases in the federal courts. The Senate Judiciary Committee held a hearing on the bill on November 16, 2005, at which Judge Howard McKibben testified on behalf of the Judicial Conference. There has been no further action on the legislation. Key provisions of the amended legislation include:

Unexhausted Claims. Federal courts would be required to dismiss unexhausted claims by state prisoners in habeas corpus proceedings with prejudice, unless the claim falls within specific, limited exceptions for review.

Limited Amendments. The number of times a prisoner may amend the application for writ of habeas corpus would be limited. Generally, an application could be amended once as a

matter of course before the earlier of either (a) the date when the answer is filed, or (b) the one-year limitation period described in subsection (d).

Procedurally Barred Claims. Federal habeas review of a claim that was found by a state court to be procedurally barred is limited. The legislation also limits review over any claim that the state court denied on its merits and on the ground that the claim was not properly raised under state procedural law.

Expedited Consideration of Habeas Petitions; Certification by Attorney General. The Attorney General may certify that state standards for appointing counsel satisfy the requirements under 28 U.S.C. §§ 2261 or 2265 for expedited consideration of habeas petitions. The Court of Appeals for the District of Columbia has exclusive jurisdiction to review the Attorney General's certification determination and must affirm it unless it is manifestly contrary to law and an abuse of discretion.

Victims' Rights. A crime victim in a federal habeas proceeding arising out of a state conviction is afforded the same rights as a crime victim in a federal criminal prosecution under amended 18 U.S.C. § 3771(b).

Appeals. Amended 28 U.S.C. § 2254 imposes time limits on a court of appeals to hear and decide an appeal from the district court in a habeas corpus proceeding. Among other things, a court of appeals must decide an appeal from an order granting or denying a writ of habeas corpus within 300 days after (a) the date when the answering brief is filed, or (b) if no answering brief is filed, the date when the answering brief would have been due.

At its September 2005 session, the Judicial Conference voted to oppose provisions of the legislation that would prevent the federal courts from reaching the merits of habeas corpus petitions, including the provisions on dismissing unexhausted claims, limiting review on procedurally barred claims, and prohibiting courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law (JCUS-SEP 05, pp. 24-26) (see attached). The legislation is also opposed by, among others, the American Bar Association, NAACP Legal Defense Fund, National Conference of Chief Justices, New York State Bar Association, two former directors of the FBI, and numerous current and former state and federal prosecutors.

Bankruptcy

On July 26, 2005, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law held an oversight hearing on the "Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Pub. L. No. 109-8) (hereinafter "the Act"). Members of Congress had expressed concern over the implementation of the Act by the Judicial Conference and Executive Office for United States Trustees. Judge A. Thomas Small appeared on behalf of the Conference and testified on the substantial amount of work done by the Rules

Committees, other Judicial Conference Committees, and Administrative Office in implementing the Act. Judge Small reassured the subcommittee that despite the tremendous amount of work required under the Act, the judiciary would be able to implement it by the statutory deadlines. (See attached.)

In August 2005, the Bankruptcy Rules Committee approved Interim Rules and Official Forms that implement the Act. The Executive Committee on behalf of the Judicial Conference approved the Official Forms and the transmission of the Interim Rules, with a recommendation that the Interim Rules be adopted locally. The rules and forms were also sent to legal publishers and software companies in mid-August 2005, in time for implementation before the October 17 effective date. The Interim Rules and Official Forms were posted on the Federal Rulemaking Internet web site.

On August 18, 2005, Senator Grassley wrote to Chief Justice Rehnquist expressing concern that the Interim Bankruptcy Rules did not faithfully implement three provisions in the Act, which generally took effect on October 17, 2005. Specifically, the senator asserted that the Interim Rules: (1) would place an unfounded burden on creditors by requiring that motions to dismiss be filed "with particularity"; (2) do not require debtors to file a certificate showing they have completed the mandated education course; and (3) do not require the debtor's counsel to attest, under oath, to the accuracy of the debtor's schedules and statements. (See attached.) Secretary Mecham wrote to Senator Grassley on September 15, 2005, informing him of the work of the Rules Committees to implement the Act. Secretary Mecham also enclosed a memorandum from Professor Jeffrey Morris, which responded that the Interim Rules did, in fact, implement the Act's provisions. Secretary Mecham noted that the Rules Committees would be considering permanent changes to the Federal Rules of Bankruptcy Procedure based on the Interim Rules. The Committees would look at the intervening experiences with the Interim Rules and determine whether any adjustments were appropriate, including the modifications suggested by the senator. (See attached.)

The Interim Rules and Official Forms implementing the Act represented a major undertaking completed within a short period of time. Although the short time frame precluded a formal public-comment period, the bench and bar have been invited to comment on the Interim Rules and Official Forms after local court promulgation in anticipation of the Interim Rules becoming permanent. The number of comments raising problems or concerns with the Interim Rules has been gratifyingly small. At its September 29-30, 2005, meeting, the Bankruptcy Rules Advisory Committee reviewed the comments submitted on the Interim Rules and Official Forms and agreed that several issues raised by the comments required further clarification. The Committee approved amendments to four Interim Rules and three Official Forms. (The Advisory Committee also concurred with proposed revisions to several Director's Procedural Forms.) The Standing Committee approved the amendments and the Executive Committee acting on behalf of the Conference approved the revisions to the Official Forms on October 11, 2005. The amendments were distributed to the courts and posted on the rules web site.

Hearsay Exception

On March 14, 2005, Representative Randy Forbes introduced the "Gang Deterrence and Community Protection Act of 2005" (H.R. 1279, 109th Cong., 1st Sess.). Senator Dianne Feinstein introduced similar legislation—the Gang Prevention and Effective Deterrence Act of 2005—on January 25, 2005 (S. 155, 109th Cong., 1st Sess.). H.R. 1279 expands federal jurisdiction over juvenile cases. It also amends Evidence Rule 804(b)(6) by codifying the rulings in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000) and *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), which admitted statements of unavailable witnesses against co-conspirators under Rule 804(b)(6) upon a finding that the co-conspirators "acquiesced in the wrongdoing that . . .procure[d] the unavailability of the declarant as witness." The House passed H.R. 1279 on May 11, 2005, by a vote of 279-144. On June 28, 2005, Secretary Mecham wrote to Chairman Specter, requesting, among other things, that the provision amending Evidence Rule 804(b)(6) be removed from the legislation, noting that the legislation was unnecessary and potentially confusing. (See attached.) No further action has been taken on S. 155.

USA PATRIOT Act

On July 11, 2005, Representative Sensenbrenner introduced the "USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005" (H.R. 3199, 109th Cong., 1st Sess.). On July 13, 2005, Senator Specter introduced similar, but not identical, legislation in "USA PATRIOT Improvement and Reauthorization Act of 2005" (S. 1389, 109th Cong., 1st Sess.). Section 231 of H.R. 3199 would amend Criminal Rule 24(c) by increasing the number of alternate jurors a court may empanel in death penalty cases from 6 to 9 and the number of peremptory challenges each side is allotted to 4 in cases where the court empanels 7-9 alternate jurors. There are no comparable provisions in the Senate bill. On July 21, 2005, the House passed H.R. 3199 by a vote of 257-171. On July 29, 2005, the Senate passed H.R. 3199 by amending the bill and substituting S. 1389. The Senate requested a conference on July 29, 2005, to reconcile the legislation. (A major sticking point has been the extension of the "sunsets" of several provisions of the PATRIOT Act that are set to expire at the end of the year.) On December 8, 2005, a compromise agreement was reached on the legislation; however, it is not known at this time whether the provision amending Criminal Rule 24(c) is part of the revised bill. Congress is expected to vote on the legislation sometime this week, but its fate in the Senate is uncertain at this time.

Other Developments of Interest

Cameras in the Courtroom. On November 9, 2005, the Senate Judiciary Committee held a hearing on the use of cameras in the courtroom. The Committee also considered several related bills that would: (1) amend title 28, United States Code, "[t]o permit the televising of Supreme Court proceedings," S. 1768, 109th Cong., 1st Sess.; and (2) allow the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. ("Sunshine in the Courtroom Act of 2005," S. 829, 109th Cong., 1st Sess.)

On November 9, 2005, the House passed the "Secure Access to Justice and Court Protection Act of 2005" (H.R. 1751, 109th Cong., 1st Sess.). Section 22 of the bill is similar to S. 829, which would allow the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings. (The legislation also has a sunset provision that rescinds the authority of a district court judge three years after enactment of the Act.) In addition, H.R. 1751 authorizes the Judicial Conference to promulgate advisory guidelines in the use of electronic media in the courtroom. There has been no further action on the legislation.

The Judicial Conference generally opposes cameras in the courtroom (*see, e.g.,* JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.

Grand Jury. The Senate Judiciary Committee was scheduled to hold a hearing on November 16, 2005, on grand jury reform. Judge Susan Bucklew was scheduled to testify on the Judicial Conference's opposition to legislation amending Criminal Rule 6 to permit counsel to accompany a witness in a grand jury proceeding, but the hearing was postponed.

James N. Ishida

Attachments

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
109th Congress

SENATE BILLS

- S. 5 - *Class Action Fairness Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Senate Judiciary Committee reported bill favorably without amendment (2/3/05). Passed Senate by vote of 72-26 (2/10/05). Passed House by vote of 279-149 (2/17/05). Signed by President (2/18/05) (Pub. L. No. 109-2).
  - Related Bills: H.R. 516
  - 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 and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), and notification of proposed settlement to appropriate state and federal officials.
— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state.

A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the class action was

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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.

brought in a forum with sufficient nexus with the plaintiff class members, (e) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (f) whether, during the three-year period preceding the filing of the class action, one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

— Section 4 also provides that a district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100. Section 4 adds additional grounds for excluding class actions from federal jurisdiction: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts. Section 5 also provides that the court of appeals may consider an appeal from a district court's remand order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal was filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. 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 the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

— Section 7 states that the amendments to Civil Rule 23, which were approved by the Supreme Court on March 27, 2003, would take effect on the date of enactment or December 1, 2003, whichever occurred first.

- S. 155 - *Gang Prevention and Effective Deterrence Act of 2005*
  - Introduced by: Feinstein
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Considered by Judiciary Committee (7/28/05).
  - Related Bills: H.R. 1279
  - Key Provisions:

    — Section 206 amends **Evidence Rule 804(b)(6)** to admit a statement offered against a party who conspired in a wrongdoing that resulted in the unavailability of the declarant.

- S. 256 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 2/1/05
  - Status: Referred to the Senate Committee on the Judiciary (2/1/05). Judiciary Committee reported favorably with amendments (2/17/05). Passed Senate by vote of 74-25 (3/10/05). Referred to House Committees on the Judiciary and Financial Services (3/15/05). House Judiciary Committee held mark-up session and ordered bill reported by vote of 22-13 (3/16/05). House Report 109-31 filed (4/8/05). Committee on Financial Services discharged (4/8/05). Passed House by a vote of 302 - 126 (4/14/05). Signed by the President (4/20/05) (Pub. L. No. 109-8).
  - Related Bills: H.R. 685
  - Key Provisions:

    — Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

    — Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

    — Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

    — Section 419 directs the Judicial Conference, after consultation with the Executive Office of the United States Trustee, to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds

a substantial or controlling interest.

— Section 433 directs the Judicial Conference to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

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

— Section 601 amends **chapter 6 of 28 U.S.C.,** directing (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to compile such statistics and make them available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than July 1, 2008.

— Section 604 expresses the sense of Congress that (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Judicial Conference should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

[SA #26 amends 11 U.S.C. § 107 restricts public access to certain sensitive information of the debtor.]

- S. 737 - *Security and Freedom Enhancement Act of 2005*
  - Introduced by: Craig
  - Date Introduced: 4/6/05
  - Status: Referred to the Senate Committee on the Judiciary (4/6/05).

- Related Bills: None
- Key Provisions:

  — Section 3 amends **18 U.S.C. § 3103** by requiring that notice be given to the subject of the search warrant within 7 days after execution of the warrant.

- S. 852 - *Fairness in Asbestos Injury Resolution Act of 2005*
  - Introduced by: Specter
  - Date Introduced: 4/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/19/05). Senate Judiciary Committee held mark-up sessions (4/28/05, 5/11/05, 5/12/05, 5/19/05); Senate Judiciary Committee reported bill favorably by a vote of 13-5 (5/26/05). Placed on legislative calendar (6/16/05). Report No. 109-97 filed (6/30/05). Senate Judiciary Committee held hearing (11/17/05).
  - Related Bills: H.R. 1957.
  - Key Provisions:

    — Section 302 provides that a claimant may petition for judicial review of the administrator's decision awarding or denying compensation under the Act. Exclusive jurisdiction rests in the circuit court where the claimant resides at the time the final order is issued. The circuit court must review the decision on an expedited basis.

    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also states that, except as provided, the remedies set forth shall be the exclusive remedy for any asbestos claim.

- S. 1088 - *Streamline Procedures Act of 2005*
  - Introduced by: Kyl
  - Date Introduced: 5/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/19/05). Committee hearing held (7/13/05). Committee consideration and mark-up sessions held (7/14/05, 7/28/05, 10/6/05, 11/16/05).
  - Related Bills: H.R. 3035
  - Key Provisions:

    — Section 2 amends **28 U.S.C. § 2254** to require federal courts to dismiss unexhausted claims with prejudice, unless the claim falls within limited exceptions for review.

    — Section 3 amends **28 U.S.C. § 2244** to limit amendments to a pending petition for writ of habeas corpus.

    — Section 4 amends **28 U.S.C. § 2254** to limit federal habeas review of a claim that was found by a state court to be barred procedurally or denied on the merits and on the ground that the claim was not properly raised under state procedural law.

    — Section 7 amends **28 U.S.C. § 2254** to impose time limits for a court of appeal

to hear and decide an appeal in a habeas corpus proceeding from the district court — Section 11 amends **18 U.S.C. § 3771(b)** to provide that a victim of a crime in a habeas corpus proceeding be afforded the same rights as provided victims of crimes in federal criminal prosecutions under 18 U.S.C. § 3771(b).

- S. 1348 - *Sunshine in Litigation Act of 2005*
  - Introduced by: Kohl
  - Date Introduced: 6/30/05
  - Status. Read twice and referred to the Senate Committee on the Judiciary (6/30/05).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.

    — Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- S. 1739 - *To amend the material witness statute to strengthen procedural safeguards, and for other purposes*
  - Introduced by: Leahy
  - Date Introduced: 9/21/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/21/05).
  - Related Bills: None
  - Key Provisions:

    — Section 1 amends **Criminal Rule 46(h)** by deleting the reporting requirement in Rule 46(h)(2). The legislation sets forth new reporting requirements under the bill.

- S. 1874 - *Alien Tort Statute Reform Act*
  - Introduced by: Feinstein
  - Date Introduced: 10/17/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/17/05).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends 28 U.S.C. § 1350 by, among other things, vesting district courts with original jurisdiction over a civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading. Section 2 may also affect **Civil Rule 9** by requiring that the complaint state

specifically facts describing each alleged tort, reasons why the action may be brought under the section, and facts showing the defendant had specific intent to commit the alleged tort.

HOUSE BILLS

- H.R. 420 - *Lawsuit Abuse Reduction Act of 2005*
  - Introduced by: Smith
  - Date Introduced: 1/26/05
  - Status: Referred to the House Judiciary Committee (1/26/05). Referred to House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee discharged (5/20/05). House Judiciary Committee held markup session and reported bill, as amended, favorably by a vote of 19-11 (5/26/05). House Report No. 109-123 filed (6/14/05). House passed by a vote of 228-184 (10/27/05).
  - Related Bills: None
  - Key Provisions:

— Section 2 amends **Civil Rule 11** by requiring the court to impose an appropriate sanction upon attorneys, law firms, or parties who violate provisions of the rule.

— Section 3 would make **Civil Rule 11** applicable to state cases affecting interstate commerce.

— Section 4 generally provides that a personal injury claim filed either in state or federal court may be filed only in the state or federal district where (1) the person bringing the claim (a) resides at the time of filing, or (b) resided at the time of the alleged injury; (2) the alleged injury or circumstances giving rise to the personal injury claim occurred; or (3) the defendant's principal place of business is located.

— Section 6 amends Civil Rule 11 by requiring a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney has violated Rule 11 three or more times.

— Section 7 creates a rebuttable presumption that Rule 11 has been violated when a party litigates—in any forum—an issue previously litigated and lost on the merits on 3 consecutive prior occasions.

— Section 8 provides for enhanced sanctions for anyone who "influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede" a pending federal court case through the willful and intentional destruction of documents in the case. If the party is an attorney, the attorney shall also be held in contempt of court.

— Section 9 states that a court may not seal a Rule 11 proceeding unless the court finds that the justification for sealing outweighs any interest in public health and safety.

- H.R. 516 - *Class Action Fairness Act of 2005*
  - Introduced by: Goodlatte
  - Date Introduced: 2/2/05
  - Status: Referred to the House Committee on the Judiciary (2/2/05).
  - Related Bills: S. 5

- 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 and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, and review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location).

  — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

  A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

  These provisions do not apply in any civil action where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.

  — Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.

  — Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

- H.R. 685 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/9/05

• Status: Referred to the House Committees on the Judiciary and Financial Services (2/9/05). Referred to the House Subcommittee on Commercial and Administrative Law (4/4/05). Referred to the House Subcommittee on Financial Institutions and Consumer Credit (5/13/05).
• Related Bills: S. 256

- H.R. 1038 - *Multidistrict Litigation Restoration Act of 2005*
  • Introduced by: Sensenbrenner
  • Date Introduced: 3/2/05
  • Status: Referred to the House Committee on the Judiciary (3/2/05). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee held mark-up session and forwarded to full committee (3/3/05). Judiciary Committee held mark-up session and ordered reported by voice vote (3/9/05). H. Rprt. 109-24 filed (3/17/05). Passed by House (4/19/05). Referred to Senate Judiciary (4/20/05).
  • Related Bills: None.
  • Key Provisions:
    — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory damages.

- H.R. 1279 - *Gang Deterrence and Community Protection Act of 2005*
  • Introduced by: Forbes
  • Date Introduced: 3/14/05
  • Status: Referred to the House Committee on the Judiciary (3/14/05). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (4/5/05). Subcommittee held mark-up session and forwarded to full committee by vote of 5-3 (4/12/05). Committee held mark-up session and ordered reported by vote of 16-11 (4/20/05). House Report No. 109-74 filed (5/5/05). House passed by vote of 279-144 (5/11/05). Received in Senate and referred to Committee on the Judiciary (5/12/05).
  • Related Bills: S. 155
  • Key Provisions:
    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 3035 - *Streamline Procedures Act of 2005*
  • Introduced by: Lungren
  • Date Introduced: 6/22/05
  • Status: Referred to the House Committee on the Judiciary (6/22/05). Referred to Subcommittee on Crime, Terrorism, and Homeland Security (6/27/05). Subcommittee

hearing held (6/30/05 and 11/10/05).
• Related Bills: S. 1088
• Key Provisions:
— Section 2 amends **28 U.S.C. § 2254** to clarify when the applicant has exhausted state-court remedies.
— Section 3 amends **28 U.S.C. § 2244** to clarify when an application for writ of habeas corpus may be amended.
— Section 4 amends **28 U.S.C. § 2254** to clarify the grounds when a federal court may consider claims found by a state court to be barred procedurally.
— Section 8 amends **28 U.S.C. § 2254** by establishing time limits for reviewing and deciding an application for writ of habeas corpus.

- H.R. 3060 - *Terrorist Death Penalty Enhancement Act of 2005*
•Introduced by: Carter
• Date Introduced: 6/24/05
• Status: Referred to House Committee on the Judiciary (6/24/05). Referred to the Subcommittee on Crime, Terrorism and Homeland Security (6/27/05). Subcommittee held hearing (6/30/05).
• Related Bills: H.R. 1763
• Key Provision:
— Section 301 amends **Criminal Rule 24(c)** to permit the court to empanel up to 9 alternate jurors, and to allow each side an additional 4 peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 3199 - *USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*
•Introduced by: Sensenbrenner
• Date Introduced: 7/11/05
• Status: Referred to House Committee on the Judiciary and Intelligence (7/11/05). Judiciary Committee held mark-up session and ordered reported by vote of 23-14 (7/13/05). Judiciary and Intelligence Committee Report No. 109-174 filed (7/18/05). House passed by vote of 257-171 (7/21/05). Passed Senate with an amendment (substituted text of S. 1389) (7/29/05). Senate requests conference (7/29/05). House appointed conferees (11/9/05). House Report No. 109-333 filed (12/8/05).
• Related Bills: S. 1266, S. 1389.
• Key Provision:
— Section 231 amends **Criminal Rule 24(c)** to permit the court to empanel up to 9 alternate jurors, and to allow each side an additional 4 peremptory challenges when 7-9 alternate jurors are empaneled.
[Section deleted in compromise legislation.]

- H.R. 3433 - *Parent-Child Privilege Act of 2005*
• Introduced by: Andrews
• Date Introduced: 7/26/05

- Status: Referred to House Committee on the Judiciary (7/26/05).
- Related Bills: None.
- Key Provision:

  — Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed new Evidence Rule 502(b), neither a parent nor a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and child.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

- H.J. Res.

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 20, 2005

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All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

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At its September 20, 2005 session, the Judicial Conference of the United States:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2005.

Committee on the Administration of the Bankruptcy System

Approved with respect to certain bankruptcy judgeships the fixing and transfer of official duty stations and designation of additional places of holding court requested by the circuit judicial councils and recommended by the Director.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Approved adoption of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2007, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Endorsed revisions to the sample interim voucher orders contained in Appendices E and F of the CJA Guidelines to reduce the suggested one-third of compensation withholding amount to 20 percent.

Approved amendments to paragraphs 2.22B(4) and 6.02F of the CJA Guidelines to help ensure that the case-budgeting process does not delay the furnishing of necessary representational services.

Committee on Federal-State Jurisdiction

Recommitted for further consideration a recommendation with respect to legislation that would eliminate federal court jurisdiction to hear certain constitutional claims.

Agreed to seek legislation to—

a. Amend section 1441(a) of title 28, United States Code, to provide that if the plaintiff has filed a declaration in state court, as part of or in addition to the initial pleading, to the effect that the plaintiff will neither seek nor accept an award of damages or entry of other relief exceeding the amount specified in section 1332(a) of this title, the case shall not be removed on the basis of the jurisdiction conferred in section 1332(a) of this title so long as the plaintiff abides by the declaration and it remains binding under state practice; and

b. Amend section 1447 of title 28, United States Code, to (1) provide that within 30 days after the filing of a notice of removal of a civil action in which the district court's removal jurisdiction rests solely on original jurisdiction under section 1332(a) of title 28, the plaintiff may file a declaration with the district court to the effect that the plaintiff will neither seek nor accept an award of damages or entry of other relief exceeding the amount specified in section 1332(a), and (2) authorize the district court, upon the filing of such a declaration, to remand the action to state court or retain the case in the interest of justice.

With regard to habeas corpus legislation, agreed to—

a. Express support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts;

b. Urge that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay;

c. Express opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review

of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):

Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
Section 6 of H.R. 3035 (harmless errors in sentencing); and
Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code);

d. Express opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law;

e. Express opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases; and

f. Express opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

Committee on Information Technology

Approved the fiscal year 2006 update to the *Long Range Plan for Information Technology in the Federal Judiciary*.

With regard to information technology security and privacy—

a. Approved the Committee on Information Technology report entitled "Judiciary Network Security and Privacy" and adopted its recommendations; and

b. Directed the Committee to coordinate implementation of the recommendations.

U.S. House of Representatives
Committee on the Judiciary

STATEMENT OF JUDGE A. THOMAS SMALL
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am A. Thomas Small, judge of the United States Bankruptcy Court for the Eastern District of North Carolina. I appear today on behalf of the Judicial Conference of the United States, the policy-making arm of the federal courts, to report on the actions taken by the federal judiciary to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [the "Act"], particularly the development of necessary new rules and forms. I serve as the bankruptcy judge representative to the Judicial Conference and am the immediate-past chair of the Advisory Committee on Bankruptcy Rules, having served in that capacity from 2000 to 2004. The present committee chair, Judge Thomas S. Zilly, is unable to attend because of pressing court business.

I appreciate this opportunity to share with you details of the hard work that the Judicial Conference and its committees have done so far in reviewing, understanding, and implementing this massive and complicated legislation within such a brief period of time. The Act exceeds 500 pages in length and affects virtually every aspect of bankruptcy cases. Among other things, it introduces the concept of a means test as a requirement of eligibility for chapter 7 relief, adds an entirely new chapter to the Code (chapter 15 governing cross border insolvencies), and creates new categories of debtors and cases (small business cases and health care businesses). The provisions of the Act generally take effect on October 17, 2005. Implementing the legislation on a timely basis presents a tremendous challenge for the judiciary.

I will address the actions taken by the Advisory Committee on Bankruptcy Rules [the "Advisory Committee" or "committee"] to develop rules and forms implementing the Act, which I understand is one of the subcommittee's principal concerns. Later, I will briefly discuss the measures taken by other Judicial Conference committees and the Administrative Office of the United States Courts to implement the Act generally.

On April 21, 2005, (one day after the Act's enactment) the Advisory Committee held an organizational meeting here in Washington to devise a plan to carry out the Act's rules-related provisions. The Advisory Committee represents a wide spectrum of views and consists of 16 members appointed by the Chief Justice, who are well experienced and expert in bankruptcy law. The committee includes six article III judges, four bankruptcy judges, three private-sector attorneys, two law professors, and an official from the Department of Justice. In addition, the Director of the Executive Office for the United States Trustees and a bankruptcy clerk of court regularly attend and participate in the committee's meetings. The committee has been working closely and very productively with the Executive Office for the United States Trustees to develop the means testing form, a primary component of the Act. At the organizational meeting, the committee's chair tasked three subcommittees to address the business, consumer, and forms issues arising from the Act. Later, the chair tasked three additional subcommittees to address the Act's provisions on cross-border insolvencies, health care, and direct appeal provisions.

The Consumer Subcommittee met separately on May 6 and June 14; the Business Subcommittee met on May 5 and June 13; and the Forms Subcommittee met on May 6 and June 15. All the subcommittees have also conducted lengthy conference calls, usually lasting more than three hours. Their work product has been reviewed by a

style subcommittee for clarity and consistency. The full Advisory Committee is holding a public meeting in Washington on August 3-4, 2005. At the meeting, the committee will consider approximately forty new or amended rules and changes to virtually all the Official Forms.

The groundwork for much of the Advisory Committee's work had been prepared and considered by the committee at its meetings in 2001 and 2002, when earlier versions of the Act appeared to be nearing passage in Congress. The committee worked on amendments to about thirty rules and changes to about twenty forms. Many of these earlier proposals remain largely unchanged or slightly refined and are part of the package now under consideration. Along with the committee's more recent consideration of the rules and forms, these records provide a rich source of information for anyone interested in the development of the rules and forms.

In accordance with established Judicial Conference procedures, all rules-related records are available to the public on request. Consistent with these procedures, the drafts of rules and forms considered by the committee at its earlier meetings, as well as all current draft rules and forms, have been and continue to be available to the public on request. The public may obtain a copy of any draft rule or form simply by contacting the Administrative Office. Likewise, all meetings of the full Advisory Committee are open to the public. Minutes of each meeting of the full Advisory Committee are posted on the judiciary's internet web site.

At the Advisory Committee's April organizational meeting, it was decided that a two-track process would be necessary to implement the Act because its impending effective date did not provide sufficient time to proceed under the regular rulemaking process, which ordinarily takes three years. The first track was to: (1) identify which rules-related provisions in the Act require an immediate response; and (2) develop interim rules and forms addressing these time-sensitive provisions well before the October 17 deadline so that the courts have adequate time to implement them. The second track will be to monitor the courts' experiences with the interim rules and forms, simultaneously proceeding with the regular rulemaking process and inviting public comment beginning in August 2006 on converting the interim rules to permanent federal rules. At the same time, the committee would also publish for comment additional proposed rule amendments not included as part of the time-sensitive interim rules package.

Under the first track, interim rules will be circulated in mid-August 2005 to the courts with a recommendation that they be adopted without change as part of a standing or general order. The Advisory Committee considered, but rejected, recommending model local rules implementing the Act because many of the model local rules would necessarily conflict with existing federal Bankruptcy Rules, which are based on pre-Act law. Local rules cannot be inconsistent with the federal rules. Any amendment of local rules will have to await amendment of the federal rules through the regular rulemaking process, which cannot be accomplished in time to meet the Act's effective date. The committee concluded that the best vehicle to accomplish the Act's objectives was to develop interim rules and urge the courts to adopt them, while simultaneously monitoring the courts' experiences and working on permanent changes to the federal rules. The same process was followed on three separate occasions in the past when the Bankruptcy Code was amended in 1978, 1986, and 1994, and interim rules contemporaneous with the Act's effective date were issued. On each occasion, the courts uniformly adopted the committee's interim rules recommendations. I am confident that the courts will continue this tradition and adopt the interim rules now under consideration.

As a practical matter, the courts' discretion in adopting the amended and new rules is limited, because many of the Act's rules-related provisions will be implemented by amended or new Official Forms, which work in tandem with the interim rules and often are based on them. Unlike the recommended interim rules, however, the Judicial Conference itself authorizes the Official Forms, which courts must "observe" under Bankruptcy Rule 9009. Thus, courts will have a real incentive to adopt the

recommended interim rules in order to facilitate compliance with the mandatory Official Forms.

Courts will require several weeks to train staff and make appropriate arrangements to implement the interim rules and forms. Major modifications must be made to the Case Management/Electronic Case Filing software, which has now been deployed in virtually all the bankruptcy courts. The judiciary must quickly accomplish many other time-consuming and burdensome tasks, which I later describe, all of which require significant lead time. In addition, legal publishing firms require at least 60 days to make appropriate software changes and arrangements to mass-produce amended or new Official Forms. To meet these demands, the Advisory Committee has been working on an expedited timetable that expects the interim rules and forms to be completed and circulated to the courts by mid-August 2005. Achieving this ambitious goal has imposed enormous burdens not only on the Advisory Committee, but on the Committee on Rules of Practice and Procedure [the "Standing Committee"] and the Judicial Conference, all of which must review and approve these actions. Then the ninety bankruptcy courts and their administrative staff will have to adopt all the changes in their local systems. Carrying out this legislation has severely strained the judiciary, which is already under enormous pressure to cope with its day-to-day responsibilities in the administration of justice. Nevertheless, the judiciary is committed to fully and faithfully execute the Act's provisions.

Recommending interim rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process is an unavoidable expedient compelled by the Act's fast-approaching effective date. To meet the Act's deadline, the Advisory Committee has devoted substantial time and effort in developing interim rules and forms that faithfully implement the Act. It has worked closely with the Executive Office for the United States Trustees. It has consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the committee's job all the more difficult. It has reached out to many corners of the bar for assistance. It has relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts have been undertaken in an open fashion to ensure that the process remains transparent, a hallmark of the rulemaking process.

The Advisory Committee's work product is outstanding. But the committee recognizes the inherent limitations of its abbreviated review process. Any shortfalls in the committee's work will be identified and corrected beginning in August 2006, when the interim rules and the amended and new Official Forms will undergo the exacting scrutiny of the regular rulemaking process. The Rules Enabling Act rulemaking process is a painstaking and time-consuming process that ensures that the best possible rules are promulgated. Permanent changes to the Federal Rules of Bankruptcy Procedure and forms to implement the Act will take place during the second track in accordance with the rulemaking process as described below.

The Rules Enabling Act rulemaking process is set out in 28 U.S.C. §§ 2071-2077. In accordance with the regular process, the Advisory Committee will review the experiences of the bench and bar with the interim rules and forms with a view toward proposing permanent amendments to the Federal Rules of Bankruptcy Procedure and recommending any additional appropriate revisions to the Official Forms. At its spring 2006 meeting, the committee is expected to approve and transmit the interim rules as proposed amendments to the federal rules, with or without appropriate revisions, to the Standing Committee at its June 2006 meeting with a recommendation that it approve publishing them for public comment. In addition, the committee will request that the package include an opportunity for the public to comment on the forms authorized in 2005. If approved, the interim rules and forms will then be published in August 2006 for a six-month period. Hearings will be scheduled at which the public can testify on timely request.

The Advisory Committee's reporter will summarize all comments and statements

submitted on the proposed rules and forms. The committee will meet in spring 2007 and consider any changes to the proposed rules and forms in light of the public comment. If approved, the committee will transmit the proposed rules and forms to the Standing Committee in June 2007 with a recommendation that they be approved and submitted to the Judicial Conference at its September 2007 session. If approved by the Standing Committee and the Conference, the proposed rules will then be submitted to the Supreme Court for its consideration. Changes to the Official Forms, however, do not have to be approved by the Court and will take effect on a date designated by the Conference. The Court has until May 1, 2008, to prescribe the rules and transmit them to Congress. The rules then would take effect on December 1, 2008, unless Congress acts otherwise.

At each stage of the rulemaking process, the proposed rule amendments and forms will be subjected to exacting scrutiny. Participation of the bench, bar, and public in the rules process ensures that the procedural rules implementing the Act will be the best that we can conceive. The rules committees have completed a remarkable amount of first-rate work, yet much remains to be done. These accomplishments are all the more impressive because they represent the work of volunteers, many of whom incur substantial monetary sacrifices in terms of lost income and all of whom sacrifice enormous amounts of time for the public good.

I have alluded in earlier parts of my statement to many other projects that the judiciary has undertaken to implement the Act. I now turn to address some of these important matters.

Members of the judiciary, including members of several Judicial Conference committees, judges, clerks, and staff at the Administrative Office of United States Courts [the "AO"] and the Federal Judicial Center [the "FJC"], have worked tirelessly to implement the Act by its general effective date. This work involves a cross-section of disciplines within the judiciary that require expertise in such areas as rules and forms, clerk's office procedures, bankruptcy administration, budget and accounting, information technology, statistics, training, human resources, and judicial education.

Information on the Act was quickly transmitted to the courts and clerks as soon as the law was enacted. Thereafter, judges, clerks, and other members of the judiciary were kept informed of issues that arise from the changes to the Bankruptcy Code, and given reports of progress on the judiciary's implementation of the Act. In addition to memoranda to the courts, the AO and the FJC have established web sites where information and analyses of the Act are posted for review and study by members of the judiciary. In order to implement the Act in an orderly, methodical, and coordinated fashion, Director Mecham determined that the AO's Office of Judges Programs would coordinate the multi-faceted implementation work.

Implementing the new law has required substantial on-going coordination with the Executive Office for the United States Trustees and meetings or exchanges with other such agencies as the Internal Revenue Service, the Department of Health and Human Services, and the Census Bureau. Additionally, the AO has called upon many individuals and groups for assistance, including members of the Judicial Conference, article III and bankruptcy judges, clerks of court, and deputy clerks. Ad hoc working groups were created, new Judicial Conference subcommittees were formed, and a special advisory group of judges and clerks was called upon to help develop new policies and procedures for bankruptcy clerks' offices.

The implementation process is progressing according to projected time tables. At this point, we expect to meet all deadlines, although it will be a struggle to do so. It is not possible to provide a detailed recitation of all of the work in progress in this short testimony, but I can provide you an overview of some of the other major initiatives beyond the rules process.

Changes in Operating Procedures

Significant changes to the courts' operating procedures are underway. First, careful

analyses of the Act to determine all the changes required in the courts' operating procedures were conducted. Thereafter, revised practices and procedures were developed to meet the requirements of the Act. Once a broad outline of the requirements and revised procedures were in place, significant changes were initiated to reprogram the judiciary's Case Management/Electronic Case Filing system. Additionally, the judiciary is developing guidelines and procedures to address various new procedures added by the Act, such as allowing in forma pauperis chapter 7 filings, handling copies of debtor-tax returns filed with the court, and instituting procedures for nationwide noticing for creditors.

Training

The FJC and the AO have planned and begun training for bankruptcy judges, bankruptcy clerks and bankruptcy administrators, and court staff, including case administrators in the clerks' offices who will use the revised CM/ECF system. Training occurs nationally at specifically designated seminars, at conferences, and via the "FJTN," the FJC's closed-circuit television broadcast channel. Many other groups have reached out to the AO for assistance or participation in their training plans.
Bankruptcy Administrator Program

The AO is working directly with the six bankruptcy administrator offices in the states of Alabama and North Carolina to prepare them to assume all the new duties and responsibilities required of them under the Act. First, careful analysis of the Act was conducted to pinpoint all the new duties, whether they are explicitly imposed on bankruptcy administrators by the Act or are needed to maintain parallel treatment with new duties imposed on United States trustees. The bankruptcy administrator offices must be educated as to the changes in the law, changes in the courts' operating procedures, and changes to the bankruptcy administrators' own duties and responsibilities, such as overseeing means testing and small business chapter 11 cases certifying consumer credit counseling and financial management courses, and taking on new audit and reporting responsibilities. The AO is in contact with each bankruptcy administrator office, and an inclusive seminar is planned for them well before the effective date of the Act. In addition, current bankruptcy administrator procedures and manuals will have to be revised substantially, and changes will have to be made to their automated case management systems.

Statistics

Major changes will be needed in the judiciary's statistical systems, both to adjust to the many changes in the bankruptcy system required in the Act generally and to comply with section 601 of the Act, which requires the AO to gather information and produce a whole new set of reports on consumer debtor cases. The AO has worked hand in hand with the Executive Office for the United States Trustees and with bankruptcy clerks to redesign the data input forms, reprogram the case management systems, design extraction programs, and build a whole new enterprise data system capable of receiving and processing the data.
Additional Judgeships

Authorization of additional bankruptcy judgeships by the Act was effective upon enactment. The Judicial Conference has notified all affected circuits, including those that did not receive the bankruptcy judgeships recommended by the Conference to Congress in early 2005. Some circuits have begun the appointment process, advertising their new vacancies and receiving applications for the positions. The AO is working to identify adequate space and facilities for these new judges and chambers staff.

We share a common interest in ensuring that the bankruptcy system as a whole is prepared on October 17, 2005, when most of the provisions of the Act are effective. The amount of work required of the judiciary to implement the Act is immense and costly, especially considering the short time frame available to accomplish the extensive revisions required of the existing systems. The work to date has been

impressive and remarkable, and we are confident that the deadlines will be met. Thank you.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

August 18, 2005

Chief Justice William H. Rehnquist
United States Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Chief Justice Rehnquist:

As the principal sponsor of the newly-enacted bankruptcy reform law (Pub. Law 109-8), I am writing to express my concern over certain rules which have been proposed by the Judicial Conference to implement this legislation. In my opinion, the Judicial Conference will play a critical role in ensuring that Public Law 109-8 is implemented in a manner that is fully consistent with Congressional intent. The Rules Enabling Act specifically envisions Congressional involvement with the judicial rule-making process. Accordingly, I am communicating these views in that spirit.

First, I am concerned that the proposed rules would require that creditor motions to dismiss be filed "with particularity". This would impose an unnecessary burden on creditors that has no statutory basis in the new bankruptcy law. A fair reading of the statute and its legislative history clearly indicates that Congress wanted to encourage creditor motions, not unduly hamper them, by removing the prior law's absolute bar to section 707(b) creditor motions. In fact, Congress has already statutorily imposed restrictions on such motions in the new bankruptcy law. *See* Public Law 109-8, Section 102(a); 119 Stat. 30-31 (providing for sanctions for abusive creditor motions under section 707(b)). Creating a new, non-statutory hurdle for creditor motions is unwarranted and clearly contrary to Congress' intent in regulating motions practice under section 707(b).

I am also concerned that the proposed rules do not require debtors to file a certificate that they have completed the pre-discharge education course mandated under the new bankruptcy law, thereby creating a possible loophole for dishonest debtors to evade this important educational requirement. *See* Public Law 109-8, Section 106; 119 Stat. 37. This educational requirement is necessary for the public good because debtors need to learn about sound financial management. Reliance on mere assurances from debtors is not

sufficient to ensure that the educational requirement will serve the purpose that Congress intended, because past experience demonstrates that debtor statements are often unreliable. Thus, by failing to require proof of education as a condition for receiving a discharge, the Judicial Conference would significantly weaken this important component of the new law.

Finally, I am deeply troubled that the proposed bankruptcy rules and forms do not require debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements. Congress deliberately chose to impose new responsibilities on debtor's counsel in consumer cases to deal with fraudulent filings and to maintain the integrity of the entire bankruptcy system. *See* Public Law 109-8, Section 102(a); 119 Stat. 30 (the new law provides that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect"). The absence of any rule specifying how counsel should comply with their new responsibilities is, in my judgment, a serious and substantial oversight that must be corrected.

I understand that Interim Rules and Official Forms may be adopted this month. I believe that the defects that I have outlined above should be corrected before adoption of the Interim Rules in order to appropriately implement the new bankruptcy law.

Thank you for considering my concerns.

Sincerely,

Chuck Grassley

Charles E. Grassley
United States Senator

CC: Thomas S. Zilly (Senior Judge)
United States District Court for the Western District of Washington
700 Stewart Street
Suite 15229
Seattle, WA 98101

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 15, 2005

Honorable Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington DC 20510-6276

Dear Senator Grassley:

Your August 18, 2005, letter to Chief Justice William H. Rehnquist, raising concerns about the judiciary's implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, was referred to me for response on behalf of the Judicial Conference of the United States. I appreciate the opportunity to share with you some of the details of the hard work undertaken by the Judicial Conference and the rules committees to implement this massive and complex legislation within a brief period of time.

Since the Act's enactment, the Advisory Committee on Bankruptcy Rules has been engaged in an intensive effort to determine the necessary changes in the rules and forms to implement the Act by the effective date, October 17. The general effective date of 180 days after enactment has not provided sufficient time to promulgate National Rules and Official Forms under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. This is normally a three-year process. The Committee concluded that the best vehicle to accomplish the Act's objectives was to develop interim rules that could be adopted by October 17 and urge the courts to adopt them, while simultaneously monitoring the courts' experiences and working on permanent changes to the Federal Rules of Bankruptcy Procedure. Because the Interim Rules have not undergone the exacting scrutiny of the Rules Enabling Act rulemaking process, the Committee concluded that it should recommend at this time only those rules and forms absolutely necessary to implement specific provisions of the Act. The Committee intends to publish more extensive proposed National Rules in response to the Act no later than August 2006 with final adoption and an effective date of December 1, 2008. These rules will be more extensive than the Interim Rules and will reflect the intervening experience of the courts in applying the Act. The Committee will also have the benefit of additional time to study the Act and to hear from interested persons concerning the proposed rules.

The Advisory Committee completed its work on the Interim Rules and Official Forms in early August 2005 and requested the Committee on Rules of Practice and Procedure and later the

Executive Committee of the Judicial Conference to act on the recommendations now to provide timely notice so that the courts may prepare for the changes and so that the legal publishing firms would have sufficient time to print and make available the amended and new rules and Official Forms. On August 11, 2005, the Executive Committee, on behalf of the Judicial Conference, approved the amended and new Official Forms and authorized distribution of the Interim Rules and Official Forms to the courts to facilitate uniformity of practice until the Federal Rules of Bankruptcy Procedure are amended.

The Interim Rules are drafted so that they can be adopted by general order. The Advisory Committee expects that most courts will adopt the Interim Rules, which will provide uniform procedures for implementing the Act and at the same time supply a valuable base of experience for its ongoing work. The same process was followed on three separate occasions in the past when the Bankruptcy Code was amended in 1978, 1986, and 1994, and interim rules contemporaneous with the Acts' effective dates were issued. On each occasion, the courts uniformly adopted the Committee's interim rules recommendations. Unlike the Interim Rules, which courts are urged to adopt, the amended and new Official Forms must be observed and used with alterations as may be appropriate under Bankruptcy Rule 9009. The Interim Rules and Official Forms were transmitted to the courts on August 24, 2005. They can be found at <www.uscourts.gov/rules>.

The Advisory Committee worked closely with the Executive Office for the United States trustees in developing the Interim Rules and amended and new Official Forms. It consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the Committee's job all the more difficult. It reached out to many corners of the bar for assistance. It relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts were undertaken in an open fashion to ensure that the process remained transparent, a hallmark of the rulemaking process. The Committee's accomplishments are all the more impressive because they represent the work of volunteers, many of whom have made substantial sacrifices to see this massive work completed in a short period of time.

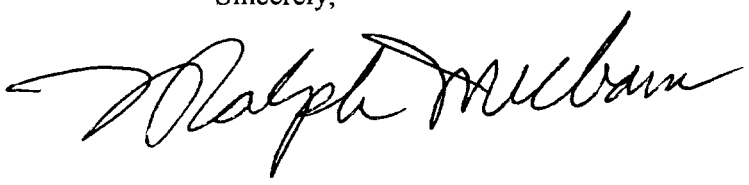
The Advisory Committee has received several comments and suggestions, including your comments, about the Interim Rules and Official Forms, which it will consider as part of its ongoing review at its upcoming meetings. In the meantime, the Bankruptcy Rules Committee's reporter, Professor Jeffrey Morris, was asked to review your concerns. The substance of his reply is attached to this letter.

The Advisory Committee recognizes the inherent limitations of its abbreviated review process. Recommending Interim Rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process is an unavoidable expedient compelled by the

Act's fast-approaching effective date. But it is anticipated that any shortfalls in the Committee's work will be identified and corrected when the Interim Rules and the amended and new Official Forms undergo the exacting scrutiny of the regular rulemaking process, when permanent changes to the rules will be considered.

The Advisory Committee thanks you for your comments, which it will consider during the formal rulemaking process. If you or your staff have any questions on these matters, please contact Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at (202) 502-1800.

Sincerely,



Secretary, Judicial Conference
of the United States

Enclosure

cc: Justice John Paul Stevens
Honorable David F. Levi
Honorable Thomas S. Zilly
Honorable Arlen Specter
Honorable Patrick J. Leahy
Honorable Orrin Hatch

MEMORANDUM TO JUDGE THOMAS S. ZILLY

SUBJECT: Reply to Senator Grassley's Letter

FROM: Professor Jeffrey W. Morris

Motions Under § 707(b)(1) and (3)

The Advisory Committee carefully considered the pleading standard for a creditor's motion to dismiss. It concluded that a creditor's motion to dismiss under § 707(b)(1) and (3) should be stated with particularity to: (1) comply with Bankruptcy Rule 9013, which requires that every "motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought;" and (2) facilitate consideration of the motion, which otherwise would be subject to a responsive motion for a more definite statement — delaying the proceeding.

The Act dramatically changed § 707(b) of the Code. Previously, a chapter 7 case could be dismissed only for "substantial abuse," and there was a presumption against dismissal. Under the Act, the presumption is removed, and a case can be dismissed on proof of "abuse." Also, creditors are now authorized to bring motions to dismiss. Of course, most dismissed cases will be dismissed for failing the means test under § 707(b)(2). If the debtor's projected income after expenses exceeds a stated amount, the case will either be dismissed, or converted to chapter 13.

For cases surviving the means test, the Act provides only that the case can be dismissed or converted if the court "finds that the granting of relief would be an abuse of the provisions of" chapter 7. In making that determination, the court must consider "(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances...." These grounds, unlike the very specific standards of the means test, are quite general. Congress seems to have selected these general standards to provide the courts with an opportunity to address these matters on a case-by-case basis. The United States trustees and creditors might allege as abusive a wide range of actions, transactions, and conduct under the Act's general standard. A rule that would allow these parties in interest to simply plead in the most general terms that the filing of a particular case is an abuse would not inform the debtor or other interested parties of the nature of the movant's objection. This would delay proceedings because a generic motion that simply states that the debtor's petition constitutes an abuse of chapter 7 would likely be met with a motion for a more definite statement of the grounds for the requested relief.

Moreover, by authorizing creditors to move for dismissal, the Act makes the creditors' actions subject to existing Bankruptcy Rule 9013. That rule has provided since 1987 that any "motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Restating this standard in Interim Rule 1017(e)(1), which sets the deadline for filing these motions, serves to remind creditors that a motion to dismiss could theoretically be denied simply for failure to include sufficient information in the motion. If this requirement were not

expressly included in the Interim Rule, it would still apply to motions to dismiss under § 707(b), but creditors might not be as aware of the requirement.

Consequently, Interim Rule 1017(e)(1) requires that the motion state with particularity the circumstances that warrant the case's dismissal. The Advisory Committee does not believe that this requirement places an undue burden on creditors and will not deter them from raising appropriate motions under the Code.

Completion of Personal Financial Management Courses

Interim Rule 1007(b)(7) provides that "In a chapter 7 or chapter 13 case, an individual debtor shall file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form." The rule requires a *statement* of completion of a course in personal financial management, as opposed to a *certificate* of completion that is required under another section dealing with completion of prepetition credit counseling. The distinction is based on the plain language of the Act, which explicitly uses the different terms.

A comparison of the prepetition credit counseling obligation to the personal financial management educational obligation set out in the Act demonstrates why the Advisory Committee did not require the filing of a certificate from the education provider but did require the filing of a credit counseling certificate. Section 109(h)(1) requires the debtor to receive credit counseling prior to filing a voluntary bankruptcy petition. Section 521(b)(1) implements that eligibility limitation of § 109(h)(1) by requiring the debtor to file "a certificate from the approved nonprofit budget and credit counseling agency." Sections 727(a)(11) and 1328(g)(1) require the debtor to complete the personal financial management course, but there is no counterpart to § 521(b)(1) (debtor must file a credit counseling certificate) requiring the debtor to file a certificate relating to the personal financial management course. Thus, the Committee concluded that Congress considered these two matters as distinct, and the Interim Rules follow that Congressional determination.

Consumer Debtors' Attorney Certifications

In accordance with long established procedures, the Bankruptcy Rules are not amended to repeat the Code's provisions, but are amended to supplement the Code, when appropriate. An Interim Rule requiring the debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements is unnecessary, because the Code fully addresses this matter.

Section 707(b)(4)(D) provides that "the signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." This provision is self-executing in that the attorney's signature on the petition (as required by Official Form 1) "shall constitute a

certification...." There's nothing more, or less, that a rule could say. The duty to conduct an appropriate investigation is placed on the attorney with no need for a rule.

It would also be both impossible and unwise to establish by rule the actions that debtors' attorneys must take in conducting inquiries about their clients' assets. The extent of an investigation should vary according to the amount of the debtor's assets and liabilities, the presence or absence of questionable prepetition actions by the debtor, whether the debtor has sought bankruptcy relief in the past, and so on. The variables are infinite, and the Advisory Committee concluded that the courts will have to address the issue of the propriety of the nature and extent of an attorney's obligations under § 707(b)(4)(D) on a case-by-case basis. Over time, a body of law will develop that will help to set the parameters of that obligation, but it is not possible to set those limits in the absence of specific cases that present the issue. Furthermore, the Committee attempted to avoid adopting rules that would establish standards of behavior or require compliance with obligations that are not clearly set out in the statute. This was a deliberate choice so that the Committee would not be resolving matters in a manner that Congress might believe is inconsistent with its intention in enacting the Act.

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

June 28, 2005

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

I am writing to provide the views of the Judicial Conference of the United States with regard to S. 155, the "Gang Prevention and Effective Deterrence Act of 2005" and H.R. 1279, the "Gang Deterrence and Community Protection Act of 2005," as passed by the House of Representatives on May 11, 2005.

Both bills would amend title 18, United States Code, to allow a significant increase in the prosecution of members of criminal street gangs and facilitate the prosecution of juvenile members. These bills would also authorize appropriations for the hiring of federal prosecutors to prosecute gangs.

In particular, section 301 of S. 155 and section 115 of H.R. 1279 would amend 18 U.S.C. § 5032 to allow a juvenile who is prosecuted for one of the specified crimes of violence or firearms offenses to "be prosecuted and convicted as an adult for any other offense which is properly joined under the Federal Rules of Criminal Procedure, and may also be convicted as an adult of any lesser included offense." Given that joinder of offenses is liberally allowed under the Rules, and that these sections of the bill further provide that the determination of the Attorney General to proceed against a juvenile as an adult is an exercise of unreviewable prosecutorial discretion, this provision could result in the federal prosecution of juveniles for myriad offenses if they are also prosecuted for a felony crime of violence or a firearms offense.

As you know, the primary responsibility for prosecuting juveniles has traditionally been reserved for the states. The federal criminal justice system has little experience and few resources to deal with more than the small number of juveniles who currently are in the federal system. The Judicial Conference has maintained a long-standing position that federal criminal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts.[1] At its September 1997 meeting, after similar legislation had been proposed by Congress, the Judicial Conference affirmed that this policy is particularly applicable to the prosecution of juveniles.[2]

In his *Year-End Report on the Federal Judiciary* (Dec. 30, 1993) the Chief Justice discussed the federalization provisions in a previous omnibus crime bill, specifically noting the juvenile provisions:

> Recent actions on a crime bill also reflect a natural response to growing concerns about crime. Unfortunately proposed legislative responses have expanded – unwisely in my view – the role of the federal courts in the administration of criminal justice. The federal courts have an important role to play in the war against crime, but I urge Congress to review carefully the impact on the federal courts, and on the traditional balance between state and federal jurisdiction, before adopting the more expansive proposals in the crime bill. Serious consideration should be given to the state courts in handling their traditional jurisdiction, rather than sweeping many newly created crimes, *such as those involving juveniles*, and handgun murders, into a federal court system that is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity. (emphasis added)

Juvenile defendants present unique problems with which the federal judicial system is not prepared to deal. When prosecuted as juveniles, the many procedural safeguards built into the juvenile statutes make these cases difficult to prosecute and adjudicate. Furthermore, whether prosecuted as juveniles or as adults, juveniles present unique behavioral and adjustment problems that must be addressed by probation and pretrial services officers. There are few federal probation officers who have training or experience to handle difficult juvenile offenders. Further, we would note that juvenile

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[1] Recommendation 2, *Long Range Plan for the Federal Courts*, 1995.

[2] JCUS-SEP 97, p. 65.

offenders require different and perhaps more extensive correctional and rehabilitative programs than adults and there is not a single federal correctional facility available to meet these needs. Thus, in the event this legislation goes forward, the Conference urges that sufficient appropriations be authorized to provide necessary training, rehabilitative, and correctional programs.

The Conference recognizes that the federal judiciary fulfills an important role in the adjudication of offenses committed by juveniles when the unique resources of the federal government can be effectively and efficiently utilized. Such offenses include juvenile criminal activity with substantial multi-state or international aspects or involving complex enterprises most effectively prosecuted using federal resources or expertise. However, the states should continue their traditional role of prosecuting the vast majority of juvenile cases in which there is no significant interstate or national interest. Any expansion of the federal role in this area should be carefully considered in light of this appropriate allocation of responsibilities.

H.R. 1279 also includes a variety of new mandatory minimum sentencing provisions. Since 1953, the Judicial Conference has maintained opposition to mandatory minimum sentences.[3] The reason is manifest: mandatory minimums require the sentencing court to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment. Mandatory minimums undermine the Sentencing Guideline regime Congress so carefully established in the Sentencing Reform Act of 1984 by preventing the rational development of guidelines that reduce unwarranted disparity and provide proportionality and fairness.[4] Mandatory minimums also destroy honesty in sentencing by encouraging "charge and fact" plea bargains. In fact, the U.S. Sentencing Commission has documented that mandatory minimums have the opposite of their intended effect.[5] Far from fostering certainty in

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[3] JCUS-SEP 53, p. 28.

[4] Although the Sentencing Guidelines are advisory in light of the Supreme Court's recent decision in *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005), sentencing courts still must consider the Guidelines in determining an appropriate sentence, which on appeal would be subject to review for "reasonableness" in consideration of the Guidelines and other factors set forth in 18 U.S.C. § 3553(a).

[5] *See* U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory*

punishment, mandatory minimums result in unwarranted sentencing disparity by treating dissimilar offenders in a similar manner, although these offenders can be quite different with respect to the seriousness of their conduct or their danger to society.

Both S. 155 and H.R. 1279 contain provisions affecting the admissibility of certain statements that would otherwise be determined under the Federal Rules of Evidence. In 1997 the Supreme Court amended Federal Rule of Evidence 804 by adding subdivision (b)(6) to provide that a party forfeits the right to object on hearsay grounds to the admission of a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Subdivision (b)(6) was intended to deprive a party from deriving a benefit from causing the unavailability of a witness to testify. Section 206 of S. 155 and section 113 of H.R. 1279 each would amend Rule 804(b)(6), using different wording, to make clear that statements of an unavailable witness can also be admitted against members of a conspiracy if the wrongdoing causing the witness's unavailability was reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy.

Sections 206 and 113 would implement the rulings in two recent cases[6] which admitted statements of unavailable witnesses against co-conspirators under Rule 804(b)(6) upon a finding that the co-conspirators "acquiesced in the wrongdoing that . . . procure[d] the unavailability of the declarant as a witness." Although courts have construed Rule 804(b)(6) to admit such statements against co-conspirators consistently with the pending legislation, the draft wording in the pending legislation raises questions regarding the scope of the Constitution's Confrontation Clause, which is undergoing reassessment in light of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). As drafted, the language of both § 206 and § 113 may permit more or fewer statements of unavailable witnesses to be admitted than may be permitted under the evolving case law. Drafting language to address these concerns is precisely the work the rulemaking process is best suited to accomplish. Moreover, because the courts are construing Rule 804(b)(6) consistently with the pending legislation, there is no apparent urgency in taking immediate action.

Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, 103d Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

[6] *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002).

Under the Rules Enabling Act, proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bench, and bar. As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious, but the painstaking process reduces the potential for satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it. We urge that you defer taking action on this proposal and allow the judiciary's rulemaking process an opportunity to review and address this issue in accordance with the Rules Enabling Act.

Accordingly, we respectfully request that the expansion of the federal criminal justice system over juvenile offenders be seriously reconsidered and that the mandatory minimum sentencing provisions and provisions that would amend the Federal Rules of Evidence be removed from the bill.

We appreciate the opportunity to comment on this significant legislation. If you have any questions, please have your staff contact Daniel Cunningham, Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy
Ranking Minority Member
Members, Senate Committee on the Judiciary

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 15, 2005

MEMORANDUM TO THE STANDING COMMITTEE

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

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

Rules Committees' Records

In Summer 2005, we began an ambitious project to locate, retrieve, scan, and archive rules committees' records prior to 1992. (We had already retrieved and posted to the judiciary's Federal Rulemaking internet web site all advisory rules committees' reports to the Standing Committee and Standing Committee's reports to the Judicial Conference from 1992/3 to present. We had also collected and posted to the web site all rules committees' minutes dating back to 1992.) To date, we have converted into electronic form all available rules committees' minutes and reports contained on microfiche from 1960-1991. Also, we have almost completed converting into electronic form over 160 agenda books for rules committees' meetings from 1992 to present. Together, these primary rules records will allow users to conduct comprehensive research on the "legislative history" of rules amendments. We are proofreading these documents and plan to post them to the web site soon.

Federal Rulemaking Web Site

To assist the courts in implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, we created a resource page on the rules web site that contains the Interim Rules and Official Forms, memoranda from the rules committees' chairs and Director Mecham, a draft order adopting the Interim Rules, and other information. The web resource is well used. In the three-month period from August 1 (shortly before the Interim Rules and Official Forms were approved) to November 1, 2005 (after the Act became effective), the web site received over 200,000 "visits" to the Bankruptcy Act web pages.

Continuing a practice we began last year, we posted to the web site all comments received on proposed amendments published for comment in August 2005. Committee members can now

view comments submitted on any proposed amendment published for comment almost as soon as we receive them. We will also continue to distribute to committee members a complete set of all comments received at the end of the comment period.

Committee and Subcommittee Meetings

For the period from May 18, 2005, to December 8, 2005, the office staffed ten meetings, including one Standing Committee meeting, five advisory rules committee meetings, three subcommittee meetings, and a meeting of the informal working group on mass torts. The office also staffed a hearing on the proposed style revisions to the Federal Rules of Civil Procedure. We also arranged and participated in numerous conference calls involving rules subcommittees.

The docket sheets of all suggested amendments for Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules have been updated to reflect the rules committees' recent respective actions. Every suggested amendment along with its source, status, and disposition is listed. The docket sheets are updated after each committee meeting, and they are posted on the rules web site.

The office staff 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 are forwarded to the appropriate reporter for consideration.

Automation Projects

Documentum continues to work very well. We are using Documentum to file, review, and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, expedite intake and processing of e-mails and attachments, and track different versions of documents to ensure the quality and accuracy of work products. We hope to add an enhancement to the system soon that will allow remote access to the database by committee members, reporters, and staff.

Miscellaneous

In August 2005, we prepared and published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure,* seeking public comment on proposed amendments to Appellate Rule 25; Bankruptcy Rules 1014, 3001, 3007, 4001, 6006, 7007.1, and new Rules 6003, 9005.1, and 9037; new Civil Rule 5.2 and revisions to the Illustrative Civil Forms; and Criminal Rules 11, 32, 35, and 45, and new Rule 49.1. We sent the pamphlet to legal publishers and the court family and posted it on the rules web site.

In October 2005, the Foreign Intelligence Surveillance Court (FISC) proposed amending its "Rules of Procedure." We reviewed and commented on draft rules proposed by the FISC and assisted the court by posting the proposed amendments on the rules web site. We received a number of comments on the proposals, which were forwarded to the FISC for its consideration.

In November 2005, the courts were advised that the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, approved by the Supreme Court on April 25, 2005, would take effect on December 1, 2005. The package includes amendments to Bankruptcy Rules 2002, 9001, and 9036, which were considered on an expedited schedule, that facilitate the transmission of notices to a centralized, agreed-upon electronic mailing address, and could save the courts considerable amounts of money in mailing and administrative expenses.

In November 2005, we also delivered to the Supreme Court proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and Federal Rules of Evidence, which were approved by the Judicial Conference at its March and September 2005 sessions. The package includes proposed new Appellate Rule 32.1 governing citation of unpublished opinions and proposed rules amendments relating to discovery of electronic information.

James N. Ishida

Attachments

CIVIL RULES SUGGESTIONS DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 5 **Permit service by Federal Express or other overnight carrier**	05-CV-I **Time Project Subcommittee of the Standing Rules Committee (Prof. Patrick J. Schiltz, Lead Reporter)** **11/23/05**	11/05 - **Received by reporter and chair** **PENDING FURTHER ACTION**
Rule 5(e) Mandatory electronic filing should be encouraged to the fullest extent possible	04-CV-G Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 11/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
New Rule 5.1 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	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and deferred action 1/05 - Standing Committee approved 3/05 - Judicial Conference approved **PENDING FURTHER ACTION**

Rule 7.1(a) Simplify filing by modifying CM/ECF to accommodate filing of supplemental statement	04-CV-I Lawrence K. Baerman, Clerk 11/29/04	12/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(c) In restyling the civil rules: delete "discharge in bankruptcy"; and insert "claim preclusion" and "issue preclusion"	04-CV-E Judge Christopher M. Klein 3/30/04	4/04 - Referred to reporter and chair 10/05 – Committee considered and agreed in principle **PENDING FURTHER ACTION**
Rule 15(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 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered 10/05 - Committee considered; subcommittee to be appointed **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered 10/05 - Committee considered; subcommittee to be appointed **PENDING FURTHER ACTION**

Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee=s report 2/04 - Committee presented E-Discovery Conference at Fordham Law School in New York 4/04 - Committee considered and approved subcommittee's recommendation to publish for public comment 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 26 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)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 26(a)(2)(B) To clarify that all testifying expert witnesses are subject to the same disclosure requirements	05-CV-C George Brent Mickum IV, Esq. 5/25/05	6/05 - Referred to reporter and chair 10/05 - Committee considered **PENDING FURTHER ACTION**
Rule 45 Personal service of a subpoena need not be the only method of service under this rule	05-CV-H New York State Bar Association Committee on Federal Procedure Gregory K. Arenson, Chair 11/17/05	11/05 - Referred to reporter and chair **PENDING FURTHER ACTION**

Rule 48 Polling the Jury	Standing Committee	10/05 - Committee considered and approved in principle **PENDING FURTHER ACTION**
Rule 54(d) and 58(c) Motions for attorney's fees and time to appeal	Appellate Rules Committee	10/05 - Committee considered **PENDING FURTHER ACTION**
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered 4/05 - Committee reviewed 10/05 - Committee considered **PENDING FURTHER ACTION**

Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and ' 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (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 recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 68 Permit plaintiffs and defendants to make offers of compromise	04-CV-H Judge Christina A. Snyder 7/23/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 68 Address the practice of "high-low" settlement agreements	04-CV-J Judge Paul D. Borman 12/21/04	12/04 - Received by chair **PENDING FURTHER ACTION**
Rule 68 No compelling request for party witnesses located out-of-state and outside 100 miles to appear at trial	05-CV-G New York State Bar Association Committee on Federal Procedure (Gregory K. Arenson, Chair; Thomas McGanney; Allan M. Pepper)	10/05 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
New Admiralty Rule G Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**

Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication. Publication to be deferred. 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 4/04 - Committee approved for publication restyle Civil Rules 38-63 6/04 - Standing Committee approved for publication 1/05 - Standing Committee approved for publication 2/05 - Published for public comment **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON CRIMINAL RULES

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

Suggestion	Docket Number, Source and Date	Status
	CRIMINAL RULES	
Rule 4 Require that foreign citizens be advised of their right to contact the consulate of their country	05-CR-A Professor Linda A. Malone 3/3/05, 3/25/05	3/05 - Referred to chair and reporter 4/05 - Committee considered 10/05 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 5 Require that foreign citizens be advised of their right to contact the consulate of their country	05-CR-A Professor Linda A. Malone 3/3/05, 3/25/05	3/05 - Referred to chair and reporter 4/05 - Committee considered 10/05 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 10 Permit the waiver of arraignment	05-CR-C Judge James F. McClure, Jr. 12/14/04	12/04 - Received by Judge Bartle and referred to chair 4/05 Committee considered 10/05 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 16 Require government to produce to defendant, upon request, all documents and tangible objects material it intends to use at sentencing	05-CR-B James E. Felman, Esq. 2/1/05	2/05 - Received by chair 4/05 - Committee considered and postponed action **PENDING FURTHER ACTION**
Rule 32 Require a party providing information to the court regarding a sentencing proceeding to provide that information to the other party	05-CR-B James E. Felman, Esq. 2/1/05	2/05 - Received by chair 4/05 - Committee considered and postponed action **PENDING FURTHER ACTION**

Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Advisory Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Advisory Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition. See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)	03-CR-F Steven W. Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Crime Victims' Rights Act Proposing 25 changes throughout the rules, including two new rules	05-CR-D Judge Paul G. Cassell 3/2/05	3/05 - Received by chair 4/05 - Committee received 4/05 - Subcommittee on Victims Rights' Act appointment 10/05 - Committee approved subcommittee's recommendations and approved in principle for publication proposed amendments to Criminal Rules 1, 12.1, 17, 32, and new rule 43.1 action **PENDING FURTHER ACTION**
Gonzalez v. Crosby 125 S. Ct. 2641 (2005) Discuss impact of increase in prisoner petitions	05-CR-F Judge Michael M. Baylson 11/2/05	11/05 - Received by Civil Rules chair & forwarded to Criminal Rules chair and reporter **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON EVIDENCE RULES

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

Suggestion	Docket Number, Source, and Date	Status
EVIDENCE RULES		
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.)		5/94 - Committee decided not to amend (comprehensive review) 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 11/96 - Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 404(a) Prohibit the circumstantial use of character evidence in civil cases		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey 11/03 - Committee considered survey 4/04 - Committee considered survey 4/05 - Committee considered survey 11/05 - Committee considered **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 609(a) Clarify types of crimes that qualify for mandatory admission under the rule		4/02 - Committee referred to reporter 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
SUBJECT MATTER		
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered 11/05 - Committee considered and approved in principle a new Evidence Rule, which would accommodate electronic evidence **PENDING FURTHER ACTION**
[Medical Billing System] — Simplify the system	04-EV-A John D. Gleissner, Esquire 1/26/05	1/05 - Referred to chair and reporter **PENDING FURTHER ACTION**

Agenda Item 4
Committee on Rules of
Practice and Procedure
January 2006
Informational

FEDERAL JUDICIAL CENTER UPDATE

The Federal Judicial Center provides this update on projects that may be related to Committee interests. The research projects described are a few of the projects undertaken by the Center, many in support of Judicial Conference committees. The educational programs described below make up a small number of the seminars and in-court programs offered in person or electronically for judges and federal court staff.

Appellate Research Projects and Publications

1. Citation of Unpublished Opinions. The Center's report of the research undertaken for the Advisory Committee on Appellate Rules is being printed and will be available for distribution soon.

2. Videoconferencing in the Courts of Appeals. As part of the Center's on-going research examining the use of technology in the federal courts, we have completed a project to examine the use of videoconferencing for oral arguments in the courts of appeals. Interviews with clerks and a sample of judges in the circuits that use or have used videoconferencing for oral argument (2nd, 3rd, 5th, 8th, 9th and 10th) covered basic technology and both general opinions and specific issues about videoconferencing. Since videoconferencing has also been used in appellate courts to enable judges in remote locations to discuss and decide cases that are not scheduled for oral argument, questions were included about this use of the technology. The information we have collected is being used to supplement the Center's handbook, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial* that we published in 2001 with the National Institute for Trial Advocacy (NITA).

3. Mediation and Conferencing Programs in the Federal Courts of Appeals. We have completed a project to produce an on-line sourcebook on mediation and conference programs in the federal courts of appeals. The new edition updates a 1997 Center print publication. The new version was prepared in response to requests from federal courts of appeals for a detailed description of the mediation and conference programs in each of the circuits, to support their interest in tracking the design of and changes in programs in other circuits.

District Court Research Projects and Publications

1. Claim Construction Issues in Patent Infringement Litigation. Ongoing confusion concerning patent claim construction appears to account for unnecessary delay and expense in resolving patent infringement cases. The Center is currently designing a project that will involve two research components: (1) surveys of district court judges and attorneys involved with recently terminated cases to identify the case management techniques that might strengthen the claim construction process, while also helping to develop a proper record for appellate review;

and (2) an exploration of the appropriateness of interlocutory appeals for claim construction decisions by examining the burdens on the district courts that may arise from reversal and remand of a claim construction.

2. Judicial Resource Implications of the Class Action Fairness Act of 2005 (CAFA). The Center has been asked by the Chair of the Civil Rules Committee to undertake, in cooperation with the Administrative Office, a wide-ranging research project examining CAFA's impact on the federal judiciary. Over time, the research might identify whether there is a need for amendments to correct unanticipated side effects of the Act and may also provide data for the courts and Congress to use to determine federal court resource needs.

3. Study Mandated by Section 6 of the Class Action Fairness Act of 2005 (CAFA). Section 6 of CAFA calls on the Judicial Conference, with the assistance of the directors of the Center and the Administrative Office, to conduct a study of settlements and attorney fee awards in class actions. Center and Administrative Office staff have met with rules committee members to assess how to meet this mandate, including whether already-developed publications and training packages will suffice. Center staff is now working with the Chair of the Advisory Committee on Civil Rules to develop a set of best practices scenarios that may be included in a February 2006 response to Congress.

4. Pocket Guide for Judges on Class Actions. The Center has produced a handbook to assist judges in managing class actions under CAFA. *Managing Class Action Litigation: A Pocket Guide for Judges* tracks, in a very concise manner, the most important and relevant practices for managing class action litigation as set out in the MCL 4th and expands or amends as necessary.

Bankruptcy Research Projects and Publications

1. Bankruptcy Judge Performance Assessment. At the request of the Bankruptcy Committee and in coordination with the National Conference of Bankruptcy Judges, the Center developed a web site with resource materials for bankruptcy judges who want to obtain performance feedback for the purposes of self-evaluation. The site includes information about developing a questionnaire, selecting the sample of attorneys to receive the survey, administering the survey, and analyzing and interpreting the results. The web site also includes a sample judicial performance questionnaire, which judges can use verbatim or adapt to better suit their needs, and a corresponding data analysis. In addition, using Webserveyor.com as a platform, the Center developed an online questionnaire that judges may adapt and use to conduct performance surveys. The Center is now developing a similar online questionnaire that will reside on its own server.

2. Bankruptcy Court Performance Assessment. The Center has assisted a number of court units in assessing their performance. At the request of the Ninth Circuit Bankruptcy Appellate Panel (BAP), the Center surveyed attorneys and pro se litigants who have participated in bankruptcy appeals before the Ninth Circuit BAP or before a district court in the Ninth Circuit. The purpose of the survey was to determine why litigants choose to proceed in the BAP or to opt out of it and to assess the performance of the BAP in four areas: general practice and procedures, motions practice, oral arguments, and decisions and written opinions. In addition, we developed a questionnaire that assesses employee satisfaction and identifies problem areas and

corresponding ideas for improvement. One court, with the Center's assistance, has conducted such a survey.

3. Bankruptcy Court Case Weights Study. In light of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Center and the Committee on the Administration of the Bankruptcy System decided earlier this year to suspend the bankruptcy case weights study that had begun in January of 2005. The purpose of the study was to generate new bankruptcy court case weights. We expect to resume the study at some point. In the meantime, we are analyzing the data collected to date so it can be compared to data collected when the study resumes in order to examine the Act's impact on the work of bankruptcy judges.

4. Updating the FJC's *Guide to the Judicial Management of Bankruptcy Mega Cases*. The Center, along with staff of the Administrative Office, has supported the work on venue issues in large chapter 11 cases being done by the Subcommittee on Venue-Related Issues of the Bankruptcy Committee. As part of our efforts, we entered a contract with Professor Laura Bartell, of the Wayne State University Law School, to update and revise the FJC's 1992 publication, *A Guide to the Judicial Management of Bankruptcy Mega Cases*. That work is close to completion and will be available as a published written report and on our web site.

Other Research Projects

1. Research Support to the Judicial Conduct and Disability Act Study Committee. Last year, Chief Justice Rehnquist appointed a committee to evaluate how the federal courts are dealing with judicial misconduct and disability. This was in response to complaints from some members of Congress that the judicial branch has not effectively used the authority delegated to it in the Judicial Conduct and Disability Act of 1980. Associate Justice Breyer chairs the committee. The AO and Center staffs are providing research support to the committee.

2. Remote Public Access to Electronic Case Files. The Court Administration and Case Management Committee (CACM) asked the Center to conduct a follow-up to our 2003 study of eleven pilot courts' experiences with providing remote public access to electronic criminal case records. The follow-up research included an assessment of remote public access to criminal, civil, and bankruptcy electronic records and focused on related issues such as redacting prohibited information in documents that are filed in the federal courts. We submitted our findings to CACM at its December 2005 meeting.

3. Pilot Project to Develop Judicial Indicators. In August of this year, the Executive Committee of the Judicial Conference gave its approval for the Committee on the Judicial Branch to conduct a pre-test focus group to assess the viability of a proposed project to establish indicators that would help monitor the overall health of the judicial branch. The Center is working with the chair of the committee to plan and design a focus group to be conducted early next year.

Educational Activities in Response to Recent Decisions and Legislation

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The Center conducted three recent FJTN programs for judges that provided an overview of the recent Bankruptcy Act and discussed some of the changes judges will face in handling consumer and

business bankruptcy cases. An FJTN program for clerks and bankruptcy administrators, supplemented by a series of five audio conferences, addressed the Act's impact on their offices. The judges' programs and the clerk's audio conferences have been digitized to facilitate access from computers. A Bankruptcy Act overview page on the Center's intranet site (cwn.fjc.dcn) contains hyperlinks to the digitized programs, as well as to several analyses of the Act, some for judges and others for clerks of court. The page also provides access to a Discussion Forum for judges and a Court Operations Exchange section for court employees to share pertinent resources and to facilitate conversations about changes caused by the Act. Sessions on the Act were included in the National Workshop for Bankruptcy Judges in September and the biennial National Conference for Clerks of Bankruptcy Courts in November (described below). Other materials and programs are under development.

2. ***United States v. Booker.*** In July, the Center, in coordination with the Judicial Conference Criminal Law Committee, staff of the AO's Office of Probation and Pretrial Programs, and the U.S. Sentencing Commission, presented the 2005 National Sentencing Policy Institute. A plenary session on *Booker*, broadcast on the FJTN in August, discussed developments since the decision and emphasized the roles of the judicial, executive, and legislative branches. Sessions on the Sentencing Guidelines post-*Booker* were added to the agendas for the Center's April 2005 chief district judges' conference and the orientation programs for new district judges. Over 150 court of appeals judges attended a Center symposium in November, where Justice Breyer moderated a panel on recent criminal law developments, including *Booker.* The next update to the *Benchbook for U.S. District Court Judges* will include *Booker* and *Fanfan* information.

Educational Programs and Publications for Chief Judges and Court Managers

1. Conferences for Chief District and Bankruptcy Judges; Strategic Planning Conferences. Separate conferences for chief district judges and chief bankruptcy judges will be conducted by the Center in spring of 2006. In conjunction with these conferences, new chief judges and their clerks of court may attend a team building and strategic planning session. The Center will also offer separate strategic planning workshops for larger teams of judges and court management staff. Two programs will be scheduled for district court teams and two for bankruptcy court teams.

2. Biennial National Conference for Bankruptcy Court Clerks, Chief Deputy Clerks, BAP Clerks, and Bankruptcy Administrators. Participants at the Center's November 2005 Biennial National Conference discussed such topics as implementation issues raised by the new Bankruptcy Act, managing the human impact of the Katrina and Rita hurricanes, and new technologies and management strategies that have been successfully implemented in some court units.

3. Leadership Institutes. An institute for new court unit executives was held in late November of 2005. Participants discussed how to identify personal leadership strengths and areas for development, set a clear and compelling direction for staff, and build resiliency for turbulent times. A program for chief deputy clerks and deputy chief probation and pretrial services officers will be held in April of 2006.

4. Multi-Year Leadership Development Programs. The 70 officers enrolled in the three-year Leadership Development Program for Probation and Pretrial Services Officers will attend a mid-program workshop in June of 2006. The 54 participants in the current class of the Federal Court Leadership Program (FCLP) are in phase three of the curriculum, which requires undertaking a temporary duty or independent research project. Applications are being accepted by the Center now through February of 2006 for the next FCLP class.

Educational Programs and Publications for Judges

1. National and Circuit-Based Workshops. Recent Center programs included a combined workshop for judges of the First and Seventh Circuits, a workshop for judges of the Fifth Circuit, and a national symposium for courts of appeals judges. In 2006, the Center will offer national workshops for district, bankruptcy, and magistrate judges.

2. Seminars. The Center held small-group programs for judges in late 2005 on such topics as handling federal death penalty cases and acquiring mediation skills. Programs during the first half of 2006 will address law-related aspects of genetics, employment, terrorism, and intellectual property. The Center's orientation seminars for new district, bankruptcy, and magistrate judges will continue to be offered in 2006.

3. FJTN Programs. In addition to the programs referenced above, in August 2005 the Center broadcast its annual review of the Supreme Court's term and its annual orientation for new law clerks. The latter program included segments on writing, editing, and the Code of Conduct as it applies to law clerks. A new web page for law clerks on the Center's intranet site (cwn.fjc.dcn) provides information about ordering the FJTN program and other resources available from the Center and the Administrative Office. All new television programs for judges, and several others produced in 2005, are now being digitized and made accessible from the Center's intranet site for viewing at one's computer.

4. Monographs. The Center recently published a guide on ***Judicial Management of Mass Tort Bankruptcy*** *Cases* by Professor S. Elizabeth Gibson. In development are new monographs on ERISA and environmental law, and updates of the monographs on copyright law and the Bail Reform Act.

5. Managing Capital Habeas Cases. In cooperation with staff of AO Defender Services, we are commencing a survey of judges who handled federal death penalty cases through trial between 1998 and 2004 to collect detailed cost and case budgeting information. The survey results will be used to update case budgeting information posted at the Center's capital case resource pages. These pages, which contain materials describing how judges have managed capital habeas cases and federal death penalty cases, can be found on the Center's intranet (cwn.fjc.dcn) and Internet (www.fjc.gov) web sites.

6. *Benchbook for U.S. District Court Judges.* Center staff, working with our *Benchbook* advisory committee of district judges and a member of the Sentencing Commission, is preparing revisions to the *Benchbook for U.S. District Court Judges* that will include *Booker* and *Fanfan* information. Publication is anticipated later this year.

On-Line Resources

In addition to the Bankruptcy Act overview, law clerks', and capital habeas case resources pages referenced earlier in the report, the following items on the Center's Internet (www.fjc.gov) and intranet (cwn.fjc.dcn) web sites may be of interest to members of the committee.

1. **Non-Prisoner Pro Se Litigation.** The Center has launched an intranet site to make available to the courts information we have collected from each of the district courts regarding their handling of *pro se* litigants. This information will be kept up-to-date.

2. **Crime Victims' Rights Act Information.** An intranet page on the new Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 has been created on the Center web site. The page includes an overview of the CVRA's key provisions and sections of the *Benchbook for U.S. District Court Judges* that may be affected by it; potential issues that may arise under the CVRA; summaries of cases applying the CVRA; and the text of § 3771.

3. **Courtroom Technology.** The Center has launched intranet and Internet web sites to help judges assess the admissibility of electronic evidence and to help Judicial Conference committees and others evaluate needs for rule and policy changes. The site contains *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, which describes the substantive and procedural considerations that may arise when lawyers use electronic equipment in the courtroom. The site also contains descriptions of other Center projects on courtroom technology, including a project on the use of videoconferencing in criminal proceedings and a project on the use of animations, simulations, and immersive virtual environment technology.

4. **Federal-State Judicial Education Activities Web Site.** As noted in past reports, the Federal-State Jurisdiction Committee of the Judicial Conference asked for assistance with its efforts to maintain information on educational programs and activities for federal and state court judges. The Center developed an Internet web site, where we continue to post whatever information we receive about recently conducted educational programs and activities that involve federal and state court judges.

Educational Programs for Probation and Pretrial Services Officers

1. **Biennial National Conference for Chief Probation and Pretrial Services Officers.** The Center's June 2006 program for chief probation and pretrial services officers will discuss managing limited budgets by maximizing technologies and staff resources.

2. **Executive Team Development.** The third offering of the new Executive Team Seminar for probation and pretrial services chiefs and deputy chiefs was held in November 2005. Each team of chiefs and deputy chiefs analyzed their district's operations and created a strategic plan.

3. **Regional Symposium for Supervising U.S. Probation and Pretrial Services Officers.** This new program, which is part of the Center's Professional Education Institute discussed below, was introduced in May 2005. Four additional symposia will be conducted through June 2006.

4. **New Supervisors' Program.** The Center's new two-year program for probation and pretrial services supervisors with less than six months' experience was launched in late 2005.

Participants undertake a Center self-study program, attend three web-audio conferences and an in-person seminar, and complete an applied learning project.

Educational Programs for Other Court Staff

1. Attorney Programs. The Center recently conducted a workshop for circuit mediators and an orientation for assistant federal defenders. A national seminar for federal defenders will be held in May of 2006.

2. Professional Education Institute. In FY 2006, the Center will launch an important new resource for court personnel in managerial positions: the Professional Education Institute (PEI). PEI is the product of nearly three years of work by Center staff and several advisory committees. It will provide an extensive, structured system of programs and resources to help managers at all levels to enhance skills and meet the challenges facing the federal courts.

3. FJTN Programs on the Center's January to June Program Schedule. The Center will produce two new editions of the *Court-to-Court* television magazine and introductory videos explaining the Professional Education Institute.

4. In-District Programs. The Center will continue to provide a variety of in-district training programs in 2006. The programs treat such topics as CM/ECF customer support for clerk's office staff and presentence investigation and supervision skills for probation and pretrial services officers.

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: December 9, 2005

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules cancelled its fall meeting, mainly because our study agenda (which is attached) was unusually light. We also had an unexpectedly complicated transition in leadership. Judge Samuel A. Alito, Jr., completed his successful tenure as chair on October 1, and then-Judge John G. Roberts, Jr., was scheduled to replace him. Judge Roberts, however, decided to take another job. I am honored that now-Chief Justice Roberts has asked me to replace him as the new chair of the Advisory Committee, and I look forward to working with the Standing Committee.

II. Action Items

The Advisory Committee is not seeking Standing Committee action on any matter.

III. Information Items

The Advisory Committee will next meet on April 28 in Los Angeles. We expect to address several matters at that meeting, including the E-Government amendment now out for public comment, recommendations from the Time-Computation Subcommittee, a proposal from the Department of Justice regarding the mandamus provisions of the Justice for All Act, a proposal to amend Rule 41 to address an issue that was ducked by the Supreme Court last Term in *Bell v. Thompson*, and several other matters.

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2005

FRAP Item	Proposal	Source	Current Status
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Standing Committee returned to Advisory Committee for further study 06/04; referred to Federal Judicial Center for study Approved with further changes by Advisory Committee 04/05 Approved by Standing Committee 06/05 Approved with changes by Judicial Conference 09/05
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 Draft approved 11/03 for submission to Standing Committee
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04 Draft approved 04/05 for submission to Standing Committee Approved for publication by Standing Committee 06/05 Published for comment 08/05
04-04	Amend FRAP 25(a) to authorize courts to mandate electronic filing.	Hon. John W. Lungstrum (D. Kan.) on behalf of CACM	Awaiting initial discussion Draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 11/04 Published for comment 11/04 Approved with changes by Advisory Committee 04/05 Approved with changes by Standing Committee 06/05 Approved by Judicial Conference 09/05
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice
05-04	Amend FRAP 41 to address *Bell v. Thompson* issue.	John G. Kester, Esq.	Awaiting initial discussion
05-05	Amend Rule 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Awaiting initial discussion
05-06	Amend Rule 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Awaiting initial discussion
06-01	Amend Rule 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Awaiting initial discussion
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Awaiting initial discussion

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TO: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. Thomas S. Zilly, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **December 12, 2005**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on August 3-5, 2005 in Washington, D.C., and on September 29-30, 2005, in Santa Fe, New Mexico. At the August meeting, the Advisory Committee reached its recommendations for amendments to the Bankruptcy Rules and Official Forms to implement the amendments to the Bankruptcy Code that were enacted on April 20, 2005, with an effective date of October 17, 2005. The Advisory Committee continued its study of the amendments to the Bankruptcy Code and reached additional recommendations for amendments to the Bankruptcy Rules and Official Forms at the meeting in September in Santa Fe.

II. Action Items

The Advisory Committee on Bankruptcy Rules has no action items at this time.

III. Information Items

A. Publication of Proposed Amendments

At its January 2005 meeting, the Standing Committee approved for publication amendments to Bankruptcy Rules 1014, 3007, and 7007.1. This approval was for publication in August 2005. At the June 2005 meeting, the Standing Committee also authorized the publication

of a preliminary draft of amendments to Bankruptcy Rules 3001, 3007 (a different subdivision of Rule 3007 from the amendment previously approved for publication at the January meeting), 4001, and 6006, and new rules 6003, 9005.1, and 9037.

The deadline for submitting comments on these proposals is February 15, 2006. Thus far, we have received only two comments on the proposals. A public hearing on the proposals is tentatively scheduled for January 9, 2006. To date, the Advisory Committee has received only one request to appear at the public hearing.

The Advisory Committee will consider all of the comments submitted on these proposals at its meeting in March, 2006. The Advisory Committee anticipates that it will present these amendments in June, 2006, to the Standing Committee for its approval and transmittal to the Judicial Conference.

B. Interim Rules and Official Forms to Implement the Bankruptcy Reform Legislation (Pub. L. No. 109-8)

The enactment of the bankruptcy reform legislation on April 20, 2005, created the need for significant revisions to the Bankruptcy Rules and Official Forms. The general effective date of the reform legislation was October 17, 2005, and the Advisory Committee and its Subcommittees met regularly to prepare proposed Interim Rules and Official Forms to implement the statutory changes. In early August, 2005, the Advisory Committee proposed a number of new rules and forms and amendments to existing rules and forms. These recommendations were approved by the Standing Committee. The Judicial Conference reviewed the proposed Interim Rules and authorized their transmission to the courts. The Judicial Conference approved the new and amended Official Forms. The approval rendered the new and amended Official Forms fully effective, and they have been in force since October 17, 2005.

The Advisory Committee continued its study of the rules and forms and made additional recommendations to the Standing Committee and Judicial Conference after the Advisory Committee meeting in September. The Interim Rules have been adopted in every district in the country. Several districts have revised one or more of the Interim Rules, but the vast majority of the courts have adopted the Interim Rules in the form they were proposed. The courts adopted the rules by standing order because there was insufficient time for adoption of the Interim Rules under the local rule adoption process. Moreover, adoption of the Interim Rules by Standing Order will permit changes to be made to the Interim Rules more quickly should experience under the Interim Rules demonstrate a need for amendments. This is particularly important because the Interim Rules were proposed on an expedited basis and without time to allow for public comment on the proposals. If changes become necessary, they can be made by another standing order. Similarly, when the Interim Rules become national rules under the Rules Enabling Act process, the Interim Rules will no longer be necessary and can be repealed by another order of the court.

Thus far, the Advisory Committee has received twenty-four comments on the Interim Rules and Official Forms. Some of these comments were made prior to the September 2005 meeting of the Advisory Committee and were considered at that time. Other comments have been received thereafter, and they will be considered at the March 2006 meeting of the Advisory Committee. Upon reconsideration of the Interim Rules at the March meeting, those rules, as they may be amended, will be recommended to the Standing Committee for publication in August 2006.

C. Other Bankruptcy Rules and Official Forms Amendments

The Advisory Committee will also be considering several other rules and forms issues raised by the reform legislation that did not have to be included in the Interim Rules and Official Forms already adopted. For example, the Advisory Committee will consider rules and forms for reporting financial information about entities in which the debtor holds a substantial or controlling interest. The Advisory Committee also will take action on rules and forms for plans and disclosure statements for small business debtors in chapter 11 cases. The reform act provided that these changes would not become effective until the promulgation of rules under the Rules Enabling Act, so they were not included in the Interim Rules package.

The Advisory Committee is also studying other possible amendments to the Bankruptcy Rules that do not involve the implementation of the reform legislation.

D. Civil Rules Restyling Project

Part VII of the Bankruptcy Rules adopts by reference many of the Rules of Civil Procedure. Other Bankruptcy Rules also adopt some of the Civil Rules, and the Advisory Committee engaged in a careful review of the restyled Civil Rules to determine whether the restyling of the Civil Rules would have any impact on the Bankruptcy Rules either because of format changes in the Civil Rules (e.g., new or renumbered subdivisions of the Rules) or because the restyled rule might change the substantive meaning of the rule in the context of a bankruptcy case. The reports of subgroups of the Advisory Committee were compiled, and a report is being submitted to the Civil Rules Committee for its consideration. This project also includes conforming amendments to the Bankruptcy Rules that can be proposed upon the adoption of the restyled Civil Rules. Since these amendments would be made simply to conform to the changes in the Civil Rules, they can likely be promulgated without publication. That would permit them to become effective at the same time as the restyled Civil Rules.

Attachments: Draft Minutes of the Advisory Committee Meeting of September 29-30, 2005
Minutes of the Advisory Committee Meeting of August 3-5, 2005
Bankruptcy Rules Tracking Docket

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of August 3-5, 2005
Washington, D.C.

Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chairman
Circuit Judge R. Guy Cole, Jr.
District Judge Laura Taylor Swain
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge Eugene R. Wedoff
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire
Dean Lawrence Ponoroff

The following members were unable to attend the meeting:

District Judge Ernest C. Torres
District Judge Richard A. Schell
District Judge Irene M. Keeley

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
Bankruptcy Judge A. Thomas Small, former chairman
Professor Melissa B. Jacoby, adviser to the committee
Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
Circuit Judge Harris L. Hartz, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Clifford J. White, Acting Director, Executive Office for U.S. Trustees (EOUST)
Donald F. Walton, Acting Deputy Director, EOUST
Monique K. Bourque, Chief Information Officer, EOUST
Mark A. Redmiles, National Civil Enforcement Coordinator, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey

Ms. Patricia S. Ketchum, adviser to the Committee
Suzanne Bingham, Armstrong & Associates International
Susan Jensen, Counsel, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives
David Lachmann, Minority Professional Staff, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives
Henry J. Sommer, Supervising Attorney, Consumer Bankruptcy Assistance Project, Philadelphia
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
Francis Szczebak, Chief, Bankruptcy Judges Division, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Jeffrey N. Barr, Office of Judges Programs, Administrative Office
Robert Niemic, Research Division, Federal Judicial Center (FJC)
Elizabeth C. Wiggins, Research Division, FJC

The following summary of matters discussed at the meeting should be read in conjunction with the 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**. The proposed Interim Rules were approved by the Committee subject to review by the Subcommittee on Style. These minutes do not reflect any stylistic changes made by the subcommittee after the meeting.

Introductory Matters

The Chairman welcomed the members, Judge Small, liaisons, advisers, staff, and guests to the meeting. Judge Small recounted his testimony on implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Bankruptcy Reform Act) before the House Subcommittee on Commercial and Administrative Law on July 26, 2005.

The Chairman reviewed the history of the development of the Interim Rules and Official Forms to implement the Bankruptcy Reform Act, including numerous conference calls, an organization meeting in Washington on Thursday, April 21, 2005, and subcommittee meetings in Washington on Thursday - Friday, May 5 - 6, 2005, and in Boston on Monday - Wednesday, June 13 - 15, 2005. The Chairman stated that his goal is to transmit the Interim Rules and Official Forms to the Standing Committee by August 11, 2005, and, if the Standing Committee approves, to the Executive Committee of the Judicial Conference by August 18, 2005. The Official Forms would be adopted by the Judicial Conference and the Interim Rules would be recommended for adoption by the courts.

The Interim Rules are expected to apply to bankruptcy cases from October 17, 2005, until final rules are promulgated and effective under the regular Rules Enabling Act process.

Meanwhile, the Committee will continue to study the Bankruptcy Reform Act and expects to request permission to publish proposed new and amended rules in August 2006. The proposed amendments would be based substantially on the Interim Rules, modified as appropriate after considering comments from the bench and bar.

Business Rules

The Committee considered the proposed Interim Rules drafted by the Subcommittee on Business Issues.

Rule 1007. The Committee discussed proposed Interim Rule 1007. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 1020. The Committee discussed proposed Interim Rule 1020. The Committee agreed to change "3 days" to "15 days" in line 8 and to change the word "designation" to "statement" in lines 19 and 22. **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 2002. The Committee discussed proposed Interim Rule 2002. The Committee agreed to substitute "(p), and (q)" for "and (p)" in line 3. The Committee agreed to substitute "make a final determination whether" for"consider a determination that" in line 15. The Committee agreed to substitute "so that" for "and that" in line 16. The Committee agreed to revise the Committee Note to discuss a single 25-day notice for a combined hearing on final approval of the disclosure statement and confirmation of the plan in small business chapter 11 cases. **A motion to approve subsections (a) and (b) of the proposed interim rule as modified was approved without dissent.** The Committee discussed whether to strike "(A) or (B)" in lines 29-30. **A motion to approve subsection (c) of the proposed interim rule as drafted was approved without dissent.** The Committee agreed to strike the words "and may decide to act only on request of a party in interest" from the end of the second paragraph of the Committee Note. **A motion to approve subsection (p) of the proposed interim rule as drafted and the Committee Note as revised was approved without dissent.**

Rule 2003. The Committee discussed proposed Interim Rule 2003. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 2007.1. The Committee discussed proposed Interim Rule 2007.1. The Committee agreed to substitute "provide" for "file" in the second line of the second paragraph of the Committee Note. **A motion to approve the proposed interim rule as drafted and the Committee Note as revised was approved without dissent.**

Rule 2015. The Committee discussed proposed Interim Rule 2015. Professor Resnick stated that the proposed Interim Rule is based on new section 308 of the Bankruptcy Code, which is not effective until 60 days after rules are prescribed to establish forms to be used to comply

with section 308. He stated that no Official Form has been proposed for section 308 reports but that the United States Trustee Program could modify its operating reports or issue a new form to be used until an Official Form is prescribed. **A motion to approve the draft of the proposed interim rule and defer further consideration of it to the regular rules process was approved without dissent.**

Rule 3002. The Committee discussed drafts of proposed Interim Rule 3002(c)(1) prepared by the Business Subcommittee and the Consumer Subcommittee. The Business Subcommittee proposed that a section 1308 claim be filed not later than 60 days after the tax return is filed. The Consumer Subcommittee proposed that a section 1308 claim be filed by the latter of 60 days after the tax return is filed or 180 days after the date of the order for relief. **The Committee approved the Consumer Subcommittee's draft of Interim Rule 3002(c)1) and Subcommittee's Committee Note.** The Committee discussed proposed Interim Rule 3002(c)(6). Professor Resnick questioned whether the existing rules conflict with the provision in section 1514 of the Code for notice to creditors with a foreign address. Judge Wedoff stated that section 1514(d) mandates an individualized determination of the reasonableness of notice for foreign creditors and that the determination cannot be made until the creditor has actually received the notice. **A motion to approve proposed Interim Rule 3002(c)(6) as drafted was approved without dissent.**

Rule 3003. The Committee discussed proposed Interim Rule 3003. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 3016. The Committee discussed proposed Interim Rule 3016. After initially approving the proposed interim rule as drafted, the Committee agreed to combine the last two sentences of subsection (b) to read as follows: "If the plan is intended to provide adequate information under § 1125(f)(1), it shall so state and Rule 3017 shall apply as if the plan is a disclosure statement." The Committee discussed subsection (d) and whether the court may require the use of a local form plan and disclosure statement in place of a national form plan and disclosure statement. **A motion to approve proposed Interim Rule 3016(b)(6) as revised, to delete the second paragraph of the Committee Note, and to table further consideration of proposed Interim Rule 3016(d) until the September meeting was approved without dissent.**

Rule 3017.1. The Committee discussed proposed Interim Rule 3017.1. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 3019. The Committee discussed proposed Interim Rule 3019. The Committee agreed to insert "the entity that proposed the modification," after "trustee" in line 24. **A motion to approve the proposed interim rule as revised was approved with one dissenting vote.**

Rule 5003. The Committee discussed proposed Interim Rule 5003. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 6004. The Committee discussed proposed Interim Rule 6004. The Committee agreed to delete "a chapter 9 municipality case or" in lines 9-10, to substitute "notice of" for "report certifying" on line 20, and to substitute "notice" for "report" on line 22. The Committee discussed inserting ", or be preceded by" in line 6 but agreed not to make the change because it could promote additional litigation. **The Committee approved the proposed interim rule as revised.**

Rule 9006. The Committee discussed proposed Interim Rule 9006. **The Committee approved the proposed interim rule as drafted without dissent.**

Consumer Rules

The Committee considered the proposed Interim Rules drafted by the Subcommittee on Consumer Issues.

Rule 1006 and Official Forms 3A and 3B. The Committee discussed proposed Interim Rule 1006 and proposed Official Forms 3A and 3B. The Committee agreed to insert "chapter 7" after "voluntary" on line 27. The Committee agreed to delete "*for Permission*" on line 10. The Committee agreed to delete "If the court grants leave to pay the filing fee in installments," on lines 21-22, to capitalize "all" on line 23, and to insert "of the filing fee" after "installments" on line 23. The Committee discussed inserting "or Bankruptcy Petition Preparer's" on line 21 after "Attorney's" so that the debtor would not be prejudiced by paying a petition preparer. The Committee declined to make the change. **A motion to approve the proposed interim rule as revised was approved without dissent.**

The Committee voted 8-2 to delete question 3 on Form 3A because of the change in Rule 9006(b). The Committee discussed adding a question on how much the debtor has paid an attorney or bankruptcy petition preparer but declined to make the change. The Committee voted 7-3 to insert "additional" before "payment" and before "property" in question 4 and to insert "to an attorney or any other person" after "property" in the same question. The Committee agreed to make the order on Form 3A parallel with the order on Form 3B by adding checkboxes for approving the terms of the application or for ordering payments according to a different schedule and by substituting "make any additional payment or transfer any additional property to an attorney or any other person" for "pay any money."

The Committee discussed adding a checkbox on the order on Form 3B for denial of the application without permitting installment payments for serial filers and other abusers. The Committee agreed to add the sentence "You may obtain this information at www.uscourts.gov, or from the clerk of court." to the third paragraph of Form 3B. The Committee discussed deleting question 9 from Form 3B but declined to make the change. The Committee discussed requiring information on the debtor's current employment but declined to require the information. The Committee agreed to delete "IT IS FURTHER ORDERED THAT" from the order on Form 3B and to revise the following sentence to read "The debtor shall pay the chapter

7 filing fee according to the following terms:" **A motion to approve the proposed Forms 3A and 3B as revised was approved without dissent.**

Rule 1007. The Committee discussed proposed Interim Rule 1007. The Committee agreed to strike "Unless the United States trustee has determined that the requirement does not apply in the district" in lines 53-55 and to capitalize "an" in line 55. Judge Walker stated that the financial management training certificate should be complete on its face without reference to the United States trustee's determination. The Committee agreed to insert "in a chapter 7 or chapter 13 case" after debtor in line 55. The Committee agreed to strike "In an involuntary case, they shall be filed by the debtor within 15 days after entry of the order for relief." on lines 70-71. The Committee agreed to substitute "current" for "currently" on line 48 and to insert "the first date set for" after "after" in line 73. Professor Resnick stated that the clerk's notice of the relief available under each chapter of the Bankruptcy Code should include a warning that an individual voluntary case may be dismissed automatically if the debtor fails to file the information required by section 521(a)(1) of the Code within 45 days after the petition. **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 9006. The Committee discussed Interim Rule 9006(b), which was approved as part of the Business Rules. The Interim Rule limits enlarging the time for filing schedules and statements in a small business case. The Committee made no consumer amendment to Rule 9006.

Rule 1009. The Committee discussed proposed Interim Rule 1009. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 1017. The Committee discussed proposed Interim Rule 1017. The Committee agreed to substitute "Except as otherwise provided in § 704(b)(2), a" for "A" in line 11 in order to avoid a conflict with that section of the Code. The Committee agreed to a corresponding revision of the Committee Note. **A motion to approve the proposed interim rule and Committee Note as revised was approved without dissent.**

Rule 1019. After the Committee discussed a number of changes in proposed Interim Rule 1019, the Chairman directed the Reporter to redraft the proposed interim rule and Committee Note. **A motion to approve the Reporter's revised draft of the interim rule and Committee Note was approved without dissent.**

Rule 2002. The Committee discussed proposed Interim Rule 2002. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 3002. The Consumer Subcommittee's version of proposed Interim Rule 3002(c) was approved during the discussion of the Business Rules.

Rule 4002. The Committee discussed proposed Interim Rule 4002, which is based in part

on a 2003 request by the EOUST. The proposed amendment to Rule 4002 was published for comment in August 2004 but was withdrawn by the Committee after passage of the Bankruptcy Reform Act. The Committee discussed whether to include a provision for a debtor who is unable to comply with section 521(e)(2) due to circumstances beyond the debtor's control. Several members stated that the debtor could raise the section 521(e)(2)(B) defense at the dismissal hearing. The Committee discussed whether evidence of the debtor's current income is needed in light of the means test and the debtor's submission of 60 days worth of payment advices under section 521(a)(1)(B)(iv). Several speakers stated that the pay stubs were part of the 2003 request and could be relevant if the debtor's pay changed just before or after the case filing. The Committee agreed to substitute "payment advice" for "pay stub"in line 33..

The Committee agreed to add a new subsection (b)(5) which provides: "The debtor's obligation to provide tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts." The Committee agreed to delete the brackets in line 31. The Committee agreed to delete the phrase "or is not in the debtor's possession" from line 50 and from lines 58-59. The Committee agreed that the Committee Note should state that because the rule implements the debtor's duty to cooperate with the trustee, the materials provided to the trustee will not be made available to any other party in interest at the § 341 meeting "other than the Attorney General." **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 4003. The Committee discussed proposed Interim Rule 4003. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 4004. The Committee discussed proposed Interim Rule 4004 and the application of section 522(q) of the Code. The Committee agreed to delete the references to sections 1141(d)(5)(C), 1228(f), and 1328(h) from line 17 because Rule 4004(c) only applies to chapter 7 cases. **A motion to approve the proposed interim rule as revised was approved without dissent.** The Committee agreed to consider the application of section 522(q) in chapter 11, chapter 12, and chapter 13 cases at the September meeting.

Rule 4006. The Committee discussed proposed Interim Rule 4006. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 4007. The Committee discussed proposed Interim Rule 4007. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 4008. The Committee discussed proposed Interim Rule 4008. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 5008. The Committee discussed proposed Interim Rule 5008. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Means Test

The Committee considered the Statement of Current Monthly Income developed by the means test working group. The working group, which consisted of Judge Wedoff, Mr. Frank, and Mr. Redmiles, recommended three separate forms because the information is used for different purposes in chapter 7, chapter 11, and chapter 13 cases. The chapter 11 form is shorter because it includes only income, not expenses. The working group proposed chapter 7 and chapter 13 forms to be used if the Internal Revenue Service does not separate ownership costs from the housing and utilities allowance and the debtor must make the calculation. The working group proposed alternative versions of the forms for use if the IRS does provide the breakout. Judge Wedoff stated that the breakout is needed to avoid including secured debt for the debtor's home mortgage in the means test calculation twice.

The Committee agreed to make the entries for rental income and for income from the operation of a business, profession, or farm net entries and to delete the deductions for business expenses. The Committee agreed to include a deduction for telecommunication services. The Committee agreed to add a deduction for education that is a condition of employment or that is required for a physically or mentally challenged dependent child. The Committee agreed that the entry in Subpart VA for Other Necessary Expenses: Insurance should include only life insurance since there is a separate entry in Subpart VB for health insurance, disability insurance, and health savings accounts.

The Committee discussed at length whether to include a catch-all category of additional expense claims which are not part of the IRS standards and, if the catch-all expenses are listed, whether they should be included in the calculation of disposable income on the form. Mr. White argued that including the catch-all expenses would defeat the objective nature of the form and make the means test more difficult to administer. Several members expressed concern that if the catch-all expenses were included in the calculation, creditors would not be notified that a presumption of abuse has arisen and that they could file a section 707(b) motion to dismiss or convert the case. Other members argued that the legislative history states that the IRS standards are non-exclusive and that it would be better for the debtor to disclose the information on the form rather than raising it later. The Committee agreed that catch-all category of additional expenses should be on the form but not included in the calculation of disposable income on the form. **A motion to approve the five proposed Official Forms as revised was approved without dissent.** The Committee agreed to designate the means test forms as Forms 22A, 22A(Alt.), 22B, 22C, and 22C(Alt.). The Committee agreed to request that the Judicial Conference approve all five forms so that Forms 22A(Alt.) and 22C(Alt.) could replace Forms 22A and 22C if the IRS separates home ownership costs.

Health Care Rules

The Committee considered the proposed Interim Rules drafted by the Subcommittee on Attorney Conduct and Health Care.

Rule 1021. The Committee discussed proposed Interim Rule 1021. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 2007.2. The Committee discussed proposed Interim Rule 2007.2. The Committee agreed to insert "within" after "or" in line 7 and to substitute "professional" for "profession" in the third paragraph of the Committee Note. **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 2015.1. The Committee discussed proposed Interim Rule 2015.1. After discussing the importance of patient privacy, the Committee agreed to insert "subject to applicable nonbankruptcy law relating to patient privacy" at the end of line 27. **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 2015.2. The Committee discussed proposed Interim Rule 2015.2. The Committee agreed to insert "subject to applicable nonbankruptcy law relating to patient privacy" at the end of line 9. **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 6011. The Committee discussed proposed Interim Rule 6011. After the Committee agreed to several changes in the proposed Interim Rule, the Chairman directed the Reporter to prepare a revised draft which includes references to applicable nonbankruptcy laws which protect patient privacy.

The Committee considered the Reporter's revised draft and made further changes. The Committee agreed to insert "BY PUBLICATION" in the title of subsection (a). The Committee agreed to substitute "be obtained and how those records may be claimed; and" for line 10 in the revised draft. The Committee agreed to revise subsection (b) as follows: "NOTICE BY MAIL UNDER § 351(1)(B). Subject to applicable nonbankruptcy law relating to patient privacy, a notice regarding the claiming or disposing of patient records under § 351(1) (B) shall, in addition to including the information in subdivision (a), direct that a patient's family member or other representative who receives the notice inform the patient of the notice, and be mailed to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, and to insurance companies known to have provided health care insurance to the patient." The Committee agreed to insert a new subsection (c) which states "PROOF OF COMPLIANCE WITH NOTICE REQUIREMENT. Unless the court orders the trustee to file proof of compliance with § 351(1)(B) under seal, the trustee shall not file, but shall maintain, the proof of compliance for a reasonable time." The Committee agreed to redesignate the former subsection (c) as subsection (d). **A motion to approve the proposed interim rule as revised was approved without dissent.**

Direct Appeal Rules

The Committee considered the proposed Interim Rules drafted by the Subcommittee on Privacy, Public Access, and Appeals.

Rule 8001. The Committee discussed proposed Interim Rule 8001 and the proposal that a premature certification be deemed conditional until a timely notice of appeal has been filed. The Committee agreed to strike the portion of subsection 8001(f)(1) after "158(d)(2)" in line 5 and to substitute "shall not be treated as a certification entered on the docket within the meaning of § 1233(b)(4)(A) of Public Law No. 109-8 until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002."

The Committee agreed to substitute "filed" for "made" in line 18, to insert "an interlocutory judgment, order, or decree has been docketed" after "appeal" on line 22. The Committee agreed to strike the portion of subsection (f)(2)(i) after "until" on line 31 and to substitute "while the matter is pending in the bankruptcy court." **A motion to approve the proposed interim rule as revised was approved without dissent.**

Rule 8003. The Committee discussed proposed Interim Rule 8003. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Official Form 24. The Committee discussed proposed Official Form 24. The Committee agreed to add "BY ALL PARTIES" to the title of the form. **A motion to approve the proposed new Official Form as revised was approved without dissent.**

Official Forms

The Committee considered the new and revised Official Forms proposed by the Subcommittee on Forms.

Rule 9009. The Committee discussed amending Rule 9009 to incorporate references in the Official Forms to the Interim Rules. The Reporter suggested that the Interim Rule state: "References in the Official Forms to these rules shall include the suggested Interim Rules approved by the Judicial Conference to implement Public Law 109-8. **A motion to approve the proposed interim rule as revised was approved without dissent.**

Official Form 8. The Committee discussed two versions of proposed amendments to Official Form 8, Chapter 7 Individual Debtor's Statement of Intention, and supporting memoranda. The Committee agreed to include leased property pursuant to section 362(h)(1) of the Bankruptcy Code and to correct the spelling of "schedule" and "personal." **A motion to approve the alternative version of the amended Official Form as revised was approved without dissent.**

Official Form 23. The Committee discussed proposed Official Form 23, Debtor's

Certification of Completion of Instructional Course Concerning Personal Financial Management. The Committee agreed to correct the formatting of the last four checkboxes and to delete "if any" from the text after the last checkbox. **A motion to approve the proposed Official Form as revised was approved without dissent.**

Official Form 19B. The Committee discussed proposed Official Form 19B, Notice to Debtor by Non-Attorney Bankruptcy Petition Preparer. The Committee agreed to substitute "you" for "a potential bankruptcy debtor" in the first paragraph and to substitute "promulgate rules or guidelines" for "prescribe guidelines" in the last paragraph on the first page. The Committee agreed to strike the final sentence in the last paragraph on page one and to substitute "As required by law, I have notified you of the maximum amount, if any, before preparing any document for filing or accepting any fee from you." **A motion to approve the proposed Official Form as revised was approved without dissent.**

Official Form 19A. The Committee discussed proposed amendments to Official Form 19A, Certification and Signature of Non-Attorney Bankruptcy Petition Preparer. The Committee agreed to substitute "the accompanying document" for the first "this document" and "that document" for the second "this document" in numbered paragraph 2. The Committee agreed to substitute "or guidelines" for "and guidelines" in numbered paragraph 3. **A motion to approve the proposed amendments as revised was approved without dissent.**

Official Form 18. The Committee discussed proposed amendments to Official Form 18, Discharge of Debtor. The Committee agreed to delete the pair of brackets after *"community property"* in the second paragraph on the second page of the form. **A motion to approve the proposed amendments as revised was approved without dissent.**

Official Form 16A. The Committee discussed proposed amendments to Official Form 16A, Caption (Full). **A motion to approve the proposed amendments as drafted was approved without dissent.**

Official Form 10. The Committee discussed proposed amendments to Official Form 10, Proof Of Claim. **A motion to approve the proposed amendments as drafted was approved without dissent.**

Official Form 1. The Committee discussed proposed amendments to Official Form 1, Voluntary Petition. The Committee agreed to insert "against the debtor" in the first sentence in the box at the bottom of page 2 for a residential tenant. **A motion to approve the proposed amendments as revised was approved without dissent.**

Official Form 4. The Committee discussed proposed amendments to Official Form 4, List of Creditors Holding 20 Largest Unsecured Claims. The Committee agreed to insert "and do not disclose the child's name" after "a minor child." **A motion to approve the proposed amendments as revised was approved without dissent.**

Official Form 5. The Committee discussed proposed amendments to Official Form 5, Involuntary Petition. The Committee agreed to change "6 years" to "8 years" in the question on ALL OTHER NAMES on page one and to correct the spelling of "recognition" in the first paragraph of the Request for Relief on page two. **A motion to approve the proposed amendments as revised was approved without dissent.**

Official Form 6. The Committee discussed proposed amendments to Official Form 6, Schedules. The Committee agreed to correct the name of Schedule D on the Form 6 cover sheet and to correct typographical errors in the schedules. The Committee agreed to insert "reasonably" after "income" in question 17 on Schedule I and after "expenditures" in question 19 on Schedule J in order to conform them to section 521(a)(1)(B)(iv) of the Bankruptcy Code. The Committee agreed to delete the question on Schedule J on chapter 12 and chapter 13 plan payments. The Committee agreed to add the statement "Do not disclose the child's name" to the second paragraph of Schedule E and the first paragraph of Schedule G. The Committee agreed to substitute "or decrease in expenses anticipated" for "[or decrease] in expenses of more than ten percent anticipated" in the first sentences of the Committee Note for Schedule J. The Committee agreed to strike the last two sentences of the Committee Note for Schedule J.

The Committee discussed how best to gather information on the amount of debt scheduled "in categories which are predominately nondischargeable," as required by section 159(c)(3)(C) of title 28. The proposed amendments would require the debtor to total the claims on Schedule D, the section 507(a)(1) and 507(a)(8) claims on Schedule E, and the predominately nondischargeable claims on Schedule F and to record the total on the Summary of Schedules. Several Committee members stated that the procedure would put the debtor in a very difficult situation. The Committee agreed to delete the Predominately Nondischargeable Liabilities column on the Summary of Schedules, the Predominately Nondischargeable Debts (PND) column on Schedule F, and the PND instructions. In their place, the Committee agreed to add a Statistical Summary of Certain Liabilities. The new Statistical Summary includes domestic support obligations; taxes and certain other debts owed to governmental units; claims for death or personal injury while intoxicated; student loans; loans from pension or profit-sharing plans; and domestic support, separation, and divorce decree obligations not reported on Schedule E. The Committee agreed to add a statement that the information is for statistical purposes only under 28 U.S.C. § 159. **A motion to approve the proposed amendments to Official Form 6 as revised was approved with one dissenting vote.**

Official Form 7. The Committee discussed proposed amendments to Official Form 7, Statement of Financial Affairs. The Committee agreed to delete the brackets (but not the bracketed language) in the fifth line of the definition of *"In business"* on page 1. The Committee agreed to use the alternative language "may be" instead of "is" in the following sentence. The Committee agreed to use "an asterisk (*)" in place of "an *" in question 3(a) and to delete the bracketed language in the same question. The Committee agreed to revise question 3(b) to require non-consumer debtors to list "each payment or other transfer to any creditor made within 90 days immediately preceding the commencement of the case if the aggregate value of all

property that constitutes or is affected by such transfer is not less than $5,000." The Committee agreed to correct a typographical error in question 10(b). The Committee agreed to combine questions 15(a) and 15(b) and to require all debtors to list all of their addresses for the last three years. **A motion to approve the proposed amendments as revised was approved without dissent.**

Official Form 9A-I. The Committee discussed proposed amendments to Official Form 9A-I, Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines. The Committee agreed to reinsert the following statement on the front of forms 9A and 9C: "Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So." The Committee agreed to delete the phrase "and the creditor does not receive the notice in time to file a proof of claim before the deadline," from the box entitled "Do Not File a Proof of Claim at This Time" on Forms 9A and 9B and from the box entitled "Claims" on Forms 9C-I. The Committee agreed to delete the multiple references to consulting an attorney on the second page and to insert the following statement in the box entitled "**Legal Advice**" at the top of page two: "Consult a lawyer to determine your rights in this case." The Committee agreed to substitute "any" for "the" in the last line of the Discharge of Debts box on page 2 of Form 9A and 9C. The Committee agreed to delete "or to Request a Hearing on Deferral of Entry of Discharge under § 727 of the Bankruptcy Code" from the box entitled Deadlines" on Forms 9A and 9C. The Committee agreed to insert "may" after "creditors" in the box entitled "Presumption of Abuse" on Forms 9A and 9C. **A motion to approve the proposed amendments as revised was approved without dissent.**

Cross Border Rules

The Committee considered the proposed Interim Rules drafted by the Subcommittee on Technology and Cross Border Insolvency.

Rule 1007. The Committee discussed proposed Interim Rule 1007. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 1010. The Committee discussed proposed Interim Rule 1010. The Committee agreed to insert "nonmain" before "proceeding" in the title, in line 3, and in line 6. The Committee agreed to revise the Committee Note to specify that the Interim Rule applies to a petition for recognition of a foreign nonmain proceeding, but not to a petition for recognition of a foreign main proceeding. **A motion to approve the proposed interim rule and the Committee Note as revised was approved without dissent.**

Rule 1011. The Committee discussed proposed Interim Rule 1011. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 2002. The Committee discussed proposed Interim Rule 2002(q). The Committee agreed to substitute "at least 20 days' notice" for "notice" on line 13 and to substitute "the

hearing on the" for "the filing of a" on line 14. The Committee agreed to insert the following sentence after line 14: "The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding." The Committee agreed to insert "of the petition for recognition of a foreign reorganization" in the first line of the Committee Note and to delete "that a petition for recognition of a foreign proceeding has been filed" from lines 5-6 of the Committee Note. The Committee agreed to delete "to those entities" from the first line of the second paragraph of the Committee Note. **A motion to approve the proposed interim rule and the Committee Note as revised was approved without dissent.**

Rule 2015. The Committee discussed proposed Interim Rule 2015(d). **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Rule 1002.1. The Committee discussed the two proposed alternatives for Interim Rule 1002.1 **A motion not to proceed with the proposed interim rule was approved without dissent.**

Rule 5012. The Committee discussed proposed Interim Rule 5012. **A motion to approve the proposed interim rule as drafted was approved without dissent.**

Transmittal to the Courts

The Committee discussed the proposed transmittal letter to the courts regarding the Interim Rules and Official Forms and the draft general order adopting the Interim Bankruptcy Rules. **A motion to approve the proposed transmittal letter and the draft model general order in substantially the form presented was approved without dissent.**

Information Matters

Form Plan and Disclosure Statement. The Committee discussed developing standard forms for a plan and disclosure statement, as provided in the Bankruptcy Reform Act. Mr. Resnick stated that the Business Subcommittee hopes to have a draft form plan and disclosure statement for consideration at the September meeting.

Letter from the ABA Task Force on Attorney Discipline. The Committee discussed a letter dated June 21, 2005, from the American Bar Association Task Force on Attorney Discipline.

Administrative Matters

The Committee's next regularly scheduled meeting will be in the Eldorado Hotel in Santa Fe on September 29 - 30, 2005.

Respectfully submitted,

James H. Wannamaker, III

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 29 - 30, 2005
Santa Fe, N.M.

Draft Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chairman
District Judge Ernest C. Torres
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
District Judge Richard A. Schell
District Judge William H. Pauley III
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge Eugene R. Wedoff
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire
G. Eric Brunstad, Jr., Esquire
J. Michael Lamberth, Esquire

The following members were unable to attend the meeting:

Circuit Judge R. Guy Cole, Jr.
Dean Lawrence Ponoroff

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
Professor Edward J. Janger, adviser to the committee
Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
District Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Circuit Judge Harris L. Hartz, liaison from the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Donald F. Walton, Acting Deputy Director, Executive Office for U.S. Trustees

(EOUST)

Mark A. Redmiles, National Civil Enforcement Coordinator, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Ms. Patricia S. Ketchum, adviser to the Committee
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Robert Niemic, Research Division, Federal Judicial Center (FJC)
Philip S. Corwin, Butera & Andrews, Washington, D.C.
Jeffrey A. Tassey, Tassey & Associates, Washington, D.C.
Michael F. McEneney, Sidley Austin Brown & Wood, Washington, D.C.

The following summary of matters discussed at the meeting should be read in conjunction with the 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 welcomed the members, Judge Levi, liaisons, advisers, staff, and guests to the meeting. The Chairman introduced the three new members, Judge Pauley, Mr. Brunstad, and Mr. Lamberth. The Chairman noted that this is the Committee's first meeting in years without Judge A. Thomas Small, the former chairman. Judge Levi commended the Committee on developing the Interim Rules and Official Forms in such a short time in order to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the bankruptcy reform act). He stated that the remarkable achievement reflects the quality of the people on the Committee and the care of former Chief Justice William H. Rehnquist in selecting the members. Judge Levi praised the former Chief Justice for his support of the rulemaking process and his lightning quick grasp of ideas. Judge Levi stated that Chief Justice John G. Roberts, Jr., also supports the rulemaking process. The Chief Justice has been a member of the Advisory Committee on Appellate Rules for a number of years as an attorney and as a judge.

The Chairman briefed the Committee on the June 2005 meeting of the Standing Committee. The Standing Committee gave its final approval to the proposed amendments to Rules 1009, 5005(a), 5005(c), and 7004. A proposed amendment to Rule 4002 was withdrawn as a result of the passage of the bankruptcy reform legislation. The proposed amendments to Rules 1009, 5005(a), 5005(c), and 7004 were approved by the Judicial Conference at its meeting in September 2005. The Standing Committee also approved the publication of proposed amendments to Rules 3001, 3007(c)-(f), 4001, 6006, and proposed new Rules 6003, 9005.1, and 9037. The Standing Committee approved the publication of proposed amendments to Rules 1014, 3007(b), and 7007.1 at its meeting in January 2005.

The Committee approved the minutes of the March 2005 meeting in Sarasota, Florida, and the August 2005 meeting in Washington, D.C. with minor corrections from Judge Swain and Mr. Kohn.

Judge Montali reported on the June 2005 meeting of the Bankruptcy Administration Committee. Judge Montali stated that the Bankruptcy Administration Committee has developed interim procedures regarding fee waivers in chapter 7 cases, guidance for safeguarding the confidentiality of tax information provided under section 521 of the Bankruptcy Code, and procedures for approving agencies which provide credit counseling and personal financial management training courses in the six judicial districts served by bankruptcy administrators. Mr. Waldron stated that the interim procedures protect the confidentiality of tax information by requiring that a party seeking access to the information must file a written request for the debtor to file the tax returns and a motion for access to tax information which has been filed.

Judge Walker reported on the April 2005 meeting of the Advisory Committee on Civil Rules. He discussed the Civil Rules Committee's work on revision of the class action rules, the electronic discovery rules, and the restyling project. Judge Klein reported on the April 2005 meeting of the Advisory Committee on evidence Rules. He stated that the Evidence Rules Committee does not favor amending the rules unless an amendment is required by an act of Congress or by a decision by the Supreme Court. The Evidence Rules Committee did not propose any amendments for publication in August 2005.

Action Items

Interim Rules and Official Forms. The Chairman reported that the Standing Committee approved the Interim Rules and Official Forms by email ballot in August 2005. The Executive Committee of the Judicial Conference approved the Official Forms and transmitted the Interim Rules for adoption by the courts. After the Interim Rules and Official Forms were distributed to the courts, publishers, and the public, Senator Charles E. Grassley wrote the Chief Justice expressing concern about some of the Interim Rules. The Director of the Administrative Office responded and enclosed a memorandum prepared by the Reporter.

Comments on the Interim Rules and Official Forms may be submitted by mail or electronically through a special link on the federal rulemaking page of the Judiciary's Internet website. The Chairman stated that 20 comments had been received by the time of the meeting. He stated that it might be possible to hold a public hearing on the Interim Rules and Official Forms this winter. The Interim Rules and Official Forms are expected to apply to bankruptcy cases from October 17, 2005, until final rules are promulgated and effective under the regular Rules Enabling Act process. Meanwhile, the Committee will continue to study the Bankruptcy Reform Act and expects to request permission to publish proposed new and amended rules based on the Interim Rules and the comments received on them at some time in 2006. The Committee discussed whether it would be better to publish the proposed new rules and forms early and provide for an extended comment period or to publish the proposed new rules and forms at the

usual time in August, when the courts and practitioners have had more experience working with the bankruptcy reform act and the Interim Rules and Official Forms.

Several Committee members stressed the importance of following the normal Rules Enabling Act process. Judge Levi stated that the Rules Enabling Act process derives its legitimacy from its participatory nature and openness to public scrutiny. The Chairman stated that the Committee tried to follow the spirit of the Rules Enabling Act by posting the Interim Rules and Official Forms on the Internet. The Committee discussed the distinction between correcting minor typos in the Interim Rules and Official Forms and making more significant changes and whether extensive changes are likely in the rules and forms published for comment. The Committee also discussed the distinction between amendments to the rules, which are approved by the Supreme Court and transmitted to Congress, and amendments to the Official Forms, which are prescribed by the Judicial Conference.

Official Forms 22A and 22C. Mr. Redmiles stated that the Internal Revenue Service has separated its local standards for housing and utilities into mortgage/rent expenses and non-mortgage expenses. This requires modification of the Statement of Current Monthly Income and Means Test Calculation, Official Form 22A or 22A(Alt.), and the Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, Official Form 22C or 22C(Alt.). The Committee considered suggested modifications of Official Forms 22A and 22C drafted by Judge Wedoff and Mr. Redmiles. Mr. Redmiles withdrew his drafts.

In order to preserve the original numbering scheme, the Committee agreed to designate two revised lines as lines 20A and 20B on Official Form 22A and as lines 25A and 25B on Official Form 22C. The IRS has declined to post the separate standards on its own website and will not use the separate standards for tax collection, but the standards will be posted on the EOUST website. In order to give filers information on where to get the required numbers, the Committee agreed to add a reference to the EOUST website to lines 20A and 20B of Official Form 22A and to lines 25A and 25B of Official Form 22C . The Committee agreed to add a section in which a debtor who contends that the process set out in lines 20A and 20B or lines 25A and 25B does not accurately compute the allowance to which the debtor is entitled under the IRS Housing and Utilities Standards can assert that an additional amount should be allowed and can set out the basis for that contention.

The Committee discussed the deduction of actual future payments on secured claims and the directive not to include insurance and taxes on line 41 of the current form 22A. Mr. Frank stated that the debtor is required to pay the insurance and taxes even if the lender does not hold the funds in escrow. Mr. Redmiles stated that the debtor does not get the deduction twice because these payments are backed out of the IRS Standards in the calculation of the deduction on line 20B or on line 25B. The Committee agreed to the change on Official Forms 22A and 22C. **A motion to revise Official Forms 22A(Alt.) and 22C(Alt.) was approved without dissent. A motion to withdraw the existing Official Forms 22A and 22C and to redesignate the amended Official Forms 22A(Alt.) and 22C(Alt.) as Official Forms 22A and 22C was**

approved without dissent.

The Committee considered suggested amendments to Form 22C, Statement of Current Monthly Income and Disposable Income Calculation, drafted by Judge Wedoff and Mr. Frank to provide for the calculation of the applicable commitment period for the chapter 13 plan. One draft calculated the applicable commitment period first and then the debtor's disposable income. The other draft reversed the two calculations. Judge Wedoff stated that a compromise approach would require the debtor to make the calculation set out on the draft amendments but would permit the debtor to contend that the income of the debtor's non-filing spouse should not be counted.

The Committee discussed whether all chapter 13 debtors should be required to calculate the applicable commitment period at the beginning of the case when it is a confirmation issue which will not arise in many cases and much of the information is available on other forms. Several Committee members stated that capturing the information at the beginning of the case on a single form would help debtors, creditors, and the standing trustee and would make the chapter 13 system more efficient. Judge McFeeley stated that spelling out the required information would make it easier for pro se debtors to prepare their repayment plans. The Reporter stated that, if the calculation is not part of the national form, chapter 13 trustees may require debtors to make the calculation on a separate form. Differing local practices could hinder national creditors.

Judge Montali suggested requiring the debtor to furnish the information without making the calculation or selecting a checkbox. Professor Resnick suggested revising the checkboxes on page 1 of the form to avoid an estoppel argument against the debtor. The Committee agreed to preface the checkboxes with the phrase "According to the calculation required by this statement, check the boxes as indicated." **A motion to approve Judge Wedoff's draft amendment of Official Form 22C, as revised, was approved by a vote of 8-4.** Professor Resnick suggested revising the checkboxes on Official Form 22A to read as follows: "According to the calculations required by this statement: ☐ The presumption arises. ☐ The presumption does not arise. (Check the box as directed in Parts I, III, and VI of this statement.)" **A motion to approve the suggested language for Official Form 22A was approved without dissent. The chairman's suggestion to make the same change on Official Form 22C also was approved without dissent.**

The National Bankruptcy Conference has written the Committee expressing concern that, by taking a position on the interpretation of section 707(b), the Official Forms force debtors to make statements, under penalty of perjury, regarding significant issues of law with which the debtors do not agree and which could be considered admissions in later proceedings. The National Bankruptcy Conference expressed concern specifically with including a non-filing spouse's income in the means test and not deducting other necessary expenses unless they fit in the categories listed on the form.

Professor Resnick stated that Official Form 22 should be neutral. He stated that the means test form is a pleading and that the debtor should be allowed to assert a good faith position on the form. Professor Resnick stated that, even if the debtor asserts that the non-filing spouse's income should not be included on Form 22A and, as a result, the clerk does not send creditors an initial presumption of abuse notice within 10 days of the petition, the United States trustee still gets the means test form and could contest the debtor's assertion. Judge Wedoff stated that the safe harbor provision in section 707(b) requires that some debtors include their non-filing spouse's income. He stated that, by excluding the non-filing spouse's income, these debtors would not be required to complete the rest of the form. The Committee also discussed whether debtors should be allowed to deduct other necessary expenses which are not included in the IRS standards listed on the form. Professor Resnick moved to reconsider inclusion of a non-filing spouse's income and the deduction of other necessary expenses. Several Committee members expressed concern about changing the form just before October 17, 2005, effective date of the bankruptcy reform act. Mr. Walton stated that the form is based on lots of compromises and discussions, which could be upset by reopening the two issues. **The motion to reconsider failed by a vote of 9-4. The Chairman referred the National Bankruptcy Conference's letter and the issues raised by the letter to the Consumer Subcommittee for consideration as part of the revision of the national rules.**

Implementation of Section 522(q). The Interim Rules include an amendment to Rule 4004(c)(1)(I) to implement sections 522(q) and 727(a)(10) of the Bankruptcy Code. The Reporter stated that the Committee limited the provision to chapter 7 cases because section 522(q) only applies in a handful of states where the homestead exemption could exceed $125,000 and discharges in individual chapter 11, 12, and 13 cases are entered only after the completion of plan payments. In addition, the chapter 7 provision requires that the court make a positive finding while the chapter 11, chapter 12, and chapter 13 provisions require negative findings. The Reporter stated that waiting until national rules are enacted may not be appropriate, however, because the debtor may make an early payout under the plan or the choice of law provisions in section 522(b)(3) may extend the geographic reach of those state's high exemption laws. Judge Wedoff stated that the Committee should deal with the issue in order to avoid unnecessary work and inconsistent local procedures in the courts.

Professor Resnick stated that requiring the debtor to state, under penalty of perjury, that section 522(q) does not apply, i.e., that the debtor has not committed a crime, in order to claim a valid homestead exemption could force the debtor to commit perjury. Judge Wedoff stated that section 522(q) has two elements — the felony and the pending proceeding. He stated that, if there is no pending proceeding, there is no perjury and, if the debtor has already been convicted, a creditor could use that conviction to object to the discharge.

The Committee discussed whether the issue could be simplified by requiring a notice that, unless a creditor objects, the court will find that there is no reasonable basis to believe that section 522(q) applies to the debtor and that there are no pending proceedings. Because creditors may not know whether there is a pending proceeding, the Committee also discussed either

requiring all individual debtors in chapter 11, chapter 12, and chapter 13 to file a section 522(q) statement or requiring the debtor to file a statement if the debtor claims a homestead exemption which exceeds $125,000. The Committee also discussed the timing of the notice or statement. Should the notice be given or the statement filed at the beginning of the case or should the notice or statement come when the debtor has completed the plan payments or requests a hardship discharge? **By a vote of 8-1, the Committee agreed in principle to require an individual debtor in chapter 11, 12, or 13 case to file a section 522(q) statement if the debtor claims a homestead exemption which exceeds $125,000 and to require that the statement be filed just before the discharge.**

The Reporter presented a draft of Interim Rule 1007(b)(8) and (c). The Committee agreed to strike the phrase "by the debtor" from subdivision (c). The Committee discussed what would happen if an individual debtor in a chapter 11, 12, or 13 case completes the plan payments and is required to file the statement but does not do so. The Reporter stated that the case would be closed without a discharge. One Committee member stated that, if the debtor no longer has an attorney, the trustee may advise the debtor to file the statement. The Committee agreed to revise subdivision (c) to require that the statement required by subdivision (b)(8) should be filed "not earlier than the date of the last payment made by the debtor under the plan or the date of a motion for entry of discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b)." Mr. Adelman suggested that the phrase "to the best of the debtor's knowledge" be deleted from subdivision (b)(8) since the requirement is included in Rule 1008. The Committee agreed. The Committee agreed to revise the Committee Note to state that creditors receive notice of the time to move for postponement of the discharge, not to object to the statement. **A motion to approve Interim Rule 1007(b)(8) and (c) and the Committee Note as revised was approved without dissent.**

The Reporter presented a draft of Interim Rule 2002(f)(11) to require that creditors be given notice of the time to move for postponement of the discharge under sections 1141(d)(5)(B), 1228(b), or 1328(b) **A motion to approve Interim Rule 2002(f)(11) and the Committee Note was approved without dissent.** The Reporter presented a draft of Interim Rule 4004(c)(3) to provide that the court shall not grant a discharge in an individual chapter 11, 12, or 13 case earlier than 30 days after the filing of the statement required under Rule 1007(b)(8). Because not every debtor is required to file the statement, the Committee agreed to substitute "If the debtor is required to file a statement under Rule 1007(b)(8), the court shall not grant a discharge earlier than 30 days after the filing of the statement." **A motion to approve Interim Rule 4004(c)(3) as revised was approved without dissent.**

Failure to Provide or File Requested Tax Documents. The Reporter stated that the bankruptcy court in the Southern District of New York had noted that section 1228 of the bankruptcy reform act states that the court shall not grant a chapter 7 debtor a discharge unless the debtor has provided requested tax documents to the court. Because the court may not know whether any tax documents have been requested or whether the debtor has filed additional returns with the tax authorities but not with the court, Professor Resnick suggested that the debtor be required to file a statement that all requested income tax returns or transcripts have been filed.

Mr. Waldron stated that, as provided in section 315(c) of the bankruptcy reform act, the Director of the Administrative Office has established procedures for safeguarding the confidentiality of tax information. The procedures state that the United States trustee, bankruptcy administrator, trustee, or other party in interest file a written request that a debtor file copies of tax returns with the court. **The Committee agreed in principle that, if a request for tax documents has been made and filed, the debtor must file a statement that all of the tax documents have been provided.**

The Reporter presented a draft of Interim Rule 4004(c)(1)(K) to provide that the court shall not issue the discharge in a chapter 7 case if the debtor has failed to file with the court each federal income tax return or transcript of such tax return as required under section 521(f) of the Code. The Committee agreed to substitute "the debtor has not filed with the court any tax documents required to be filed under § 521(f)." The Committee discussed how the clerk would know whether the debtor had filed all of the tax documents since the debtor may file additional documents with the tax authorities during the course of the case. The Committee agreed to substitute "a motion to delay discharge, alleging that the debtor has not filed with the court all tax documents required to be filed under § 521(f), is pending." **A motion to approve Interim Rule 4004(c)(1)(K) as revised was approved without dissent.** The Committee agreed to substitute the following for the first paragraph of the Committee Note covering the two amendments to Interim Rule 4004: "Subdivision (c)(1) is amended by adding subparagraph (K) to implement § 1228(a) of Public Law No. 109-8." **A motion to approve the Committee Note as revised was approved without dissent.**

Interim Rule 8001(f). The Reporter stated that Interim Rule 8001(f) covers a direct appeal to the court of appeals from a final judgment, order, or decree of the bankruptcy court and from an appeal of an interlocutory order or decree of the bankruptcy court. Although the Interim Rule suggests that a grant of leave to appeal is required for any interlocutory appeal, section 158(a)(2) of title 28 authorizes interlocutory appeals of interlocutory orders and decrees issued under section 1121(d) of the Bankruptcy Code. The Reporter presented a draft amendment to cover all three forms of appeals. **A motion to approve the proposed amendment to Interim Rule 8001(f) approved without dissent.**

Other Pending Matters Including Comments on the Interim Rules and Official Forms. Bankruptcy Judge Robert E. Grant wrote the Committee concerning the impact of the Interim Rules and the amendment of section 524 of the Bankruptcy Code on the reaffirmation process. The Reporter stated that the proposed amendment to Rule 4008 which was to be effective on December 1, 2005, has been withdrawn as a result of the passage of the bankruptcy reform act but that there still may be a need to require that reaffirmation agreements be filed earlier. Judge Montali suggested that the timing problem could be resolved by dividing Rule 4008 and putting the new section 524(k) provisions in the second paragraph. **A suggestion to defer the matter and consider it as part of the amendment of the national rules was approved without dissent. The matter will be referred to the Consumer Subcommittee for further action.**

The Committee also discussed the comments on the Interim Rules and Official Forms submitted by Bankruptcy Judge Bruce A. Markell, Bankruptcy Judge Robert J. Kressel, and others. The Committee discussed how to disseminate the Interim Rules and clearly indicate the changes since the Interim Rules were originally approved in August. The Chairman suggested distributing "redline" copies of the Interim Rules which are amended and copies of the complete Interim Rules, including the ones which have been amended. A Committee member suggested dating updates to the Interim Rules.

The Committee discussed the small business profitability and compliance report required by section 434 of the bankruptcy reform act. Because the reporting provision is not effective until 60 days after rules are enacted to implement it, the form was not included in the Interim Rules and Official Forms. The Reporter stated he plans to contact experts on bankruptcy insolvency accounting for suggestions for the form.

Model Plan and Disclosure Statement. Professor Janger stated that a group of members of the Business Subcommittee has completed a draft model plan for small chapter 11 debtors and expects to prepare a draft model disclosure statement for consideration at the March meeting. He stated that the group probably also will prepare a combined model plan and disclosure statement for the March meeting. Professor Janger said the group had shortened the model plan from 12 pages to 5. Professor Resnick stated that the model plan is a "bare bones" plan which can be modified as necessary. He stated that the debtor can use the model plan or write its own plan as long as the plan is not inconsistent with the Bankruptcy Code. Ms. Ketchum suggested that the model plan include a statement that the form can be supplemented or customized. The Committee discussed the model plan and made several changes in the draft. The Committee also discussed the statutory provision for the courts to approve their own model plans and disclosure statements. **A motion to approve the draft model plan in principle was approved without dissent. Further consideration of the model plan and disclosure statement will be on the agenda for the March 2006 meeting.**

Proposed Rule 2002(g)(4), the Bankruptcy Reform Act, and Interim Rule 2002. A pending amendment to Rule 2002(g) would allow an entity to designate an address for the purpose of receiving notices. The proposed amendment is pending before Congress with an effective date of December 1, 2005. The amendment was requested by creditors and endorsed by the Judiciary as a means of providing additional service while saving money. Sections 342(e) and (f), which were added to the Bankruptcy Code by the reform act, provide that a creditor in an individual chapter 7 or 13 case may file a notice of address which must be used by the debtor and the court thereafter in that case and that an entity may file with any bankruptcy court a notice that all courts must use for that creditor in all chapter 7 and chapter 13 cases. The Committee has concluded that the new statutory provisions do not conflict with the proposed amendment to Rule 2002(g)(4), even if the statute gives creditors additional rights.

The Reporter stated that existing Rule 2002(g)(2), provides, however, that in the absence of a notice under Rule 2002(g)(1), notices shall be sent to the address shown on the list of

creditors, which does not take into account the new section 342(f). The Reporter suggested that an exception for section 342(f) of the Code be added to Interim Rule 2002(g)(2). **A motion to incorporate an exception for section 342(f) in Interim Rule 2002(g)(2) was approved without dissent. A motion to approve the Interim Rules as amended was approved without dissent.**

Official Form 1, Voluntary Petition. Official Form 1 was intended to function both as a voluntary petition under the appropriate chapter of the Bankruptcy Code and as a petition for recognition under chapter 15. Ms. Ketchum stated that the language in the signature block labeled "Signature of a Foreign Representative of a Recognized Foreign Proceeding" probably works reasonably well for a foreign representative filing a voluntary petition after recognition has been grated, but that the language does not work well for a foreign representative seeking recognition under chapter 15.

Ms. Ketchum suggested revising the form to include two signature blocks: one for filing a voluntary case and one for seeking recognition. Mr. Shaffer suggested using a single signature block for foreign representatives with two checkboxes. Ms. Ketchum presented a draft revision incorporating the suggestion. The draft struck the words "of a Recognized Foreign Representative" from the title of the signature block, the word "main" from the first sentence of the statement, and the second sentence of the statement in its entirety. The checkboxes were as follows: "☐ The debtor requests relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by § 1515 of title 11 are attached. ☐ Pursuant to § 1511 of title 11, United States Code, the debtor requests relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached." Judge Montali suggested substituting "I request" for "The debtor requests" in each checkbox. The Committee agreed. **A motion to approve the amendment to Official Form 1 as revised was approved without dissent.**

Official Forms 9G and 9H, § 341 Notices for Chapter 12 Family Farmers. Ms. Ketchum stated that the bankruptcy reform legislation amended section 109(f) of the Bankruptcy Code to extend relief under chapter 12 to family fishermen. She stated that the title of the form on page 1 and the first explanation on page 2 refer only to family farmers. She stated that the absence of a reference to family fishermen could be confusing to creditors in a family fishermen case. **The Committee agreed to defer the matter to the March 2006 meeting. The matter will be referred to the Forms Subcommittee.**

Letter from the ABA Task Force on Attorney Discipline. The Committee discussed a letter dated June 21, 2005, from the American Bar Association Task Force on Attorney Discipline. **The Committee concluded that no change was required in the Interim Rules. The Chairman referred the matter to the Subcommittee on Attorney Conduct and Health Care for further consideration as part of the revision of the national rules.**

Objections to Exemptions. At its meetings in September 2004 and March 2005, the

Committee discussed proposed amendments to Rule 4003(b) to extend the time to object to exemptions when the debtor's claim of exemptions has no good faith basis and to Rule 4003(b) to permit creditors to object to the exemption as a defense to a lien avoidance action notwithstanding that the Rule 4003(b) objection period has expired. **The proposed amendment to Rule 4003(d) was approved in principle at the March meeting and both amendments were then referred to the Consumer Subcommittee for further study.**

The Reporter stated that the subcommittee has recommended extending the 30-day objection period in Rule 4003(b) to 60 days after the meeting of creditors and adding a new subdivision (b)(2) which provides that the trustee may file an objection at any time up to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The Committee discussed whether a Rule 9011 standard would be better, but agreed to retain the fraud standard and the one-year deadline, which are the same as those for revoking the debtor's discharge under section 727(d) of the Bankruptcy Code. Mr. Brunstad stated that the fraud standard would protect a debtor who innocently submits an unjustified claim of exemptions. Because the trustee is discharged when the case is closed, the Committee agreed to provide in subdivision (b)(2) that the United States trustee also can object up to one year after closing. The Committee agreed to correct the reference to § 522(b)(3) in the first paragraph of the Committee Note. **A motion to approve the proposed amendments and the Committee Note as revised was approved without dissent.**

Director's Procedural Forms. Ms. Ketchum presented draft revisions of Director's Procedural Forms 18J, 18JO, 18F, 18FH, 18W, and 18WH, discharge forms for use in joint cases, chapter 12 cases, and chapter 13 cases. She asked that the Committee members review the drafts and respond by email by October 4, 2005 with any suggested changes.

Ms. Ketchum stated that most of the draft revision of Form B201, Notice to Individual Consumer Debtor under § 342(b) of the Bankruptcy Code, represented a consensus of the Subcommittee on Forms but that the subcommittee was unable to agree on the signature blocks. Ms. Ketchum stated that a pro se debtor must read and sign the notice but there are questions about whether a debtor with an attorney or a bankruptcy petition preparer must file a copy of the notice and who should sign it. Judge Montali stated that section 110 of the Code requires that a petition preparer sign all documents the preparer prepares for filing. The signature blocks for individual or joint debtors and for petition preparers on Official Form 1, Voluntary Petition, include references to obtaining or providing the 342(b) notice. Because section 342(b) requires that the clerk provide a notice to an individual, consumer debtor before the case is filed, several Committee members stated that requiring the debtor to sign and file a copy of the notice would avoid any question about whether the notice has been given. Mr. Frank stated that a separate filing by the debtor's attorney is not needed because the attorney would usually have the debtor sign the notice and retain the signed copy in the attorney's files. The Committee agreed to delete the certification by the debtor's attorney. **A motion to approve Form B201 as revised was approved without dissent.**

Ms. Ketchum presented two versions of a draft revision of Form B240, Reaffirmation Agreement. The two versions differed in where the caption is placed and how much of the form would be filed with the court. The Committee agreed to use Mr. Kohn's version of the form with the caption on the first page and the entire form to be filed. The Committee agreed with Judge Klein's suggestion to substitute the following for the last two sentences of the Order Approving Reaffirmation Agreement: "COURT ORDER: The court grants the debtor's motion and approves the reaffirmation agreement described above." **A motion to approve Form B240 as revised was approved with one dissenting vote.**

Rule 5001(b) and Court Hearings During Emergencies. At its meeting in September 2003, the Committee approved in principle a proposed amendment to Rule 5001(b) which would authorize bankruptcy judges to hold court outside the district in emergencies. Further action was deferred until Congress acted on the related amendment to section 152(c) of title 28. The catastrophic events of Hurricane Katrina brought the matter back to Congress. The Federal Judiciary Emergency Special Sessions Act of 2005, Public Law 109-63, was signed by the President on September 9, 2005. The Committee reviewed the draft language approved in 2003 and agreed to move the phrase "except as provided in 28 U.S.C. § 152(c)(2)" to the end of the rule and to change the statutory reference in the Committee Note to "§ 152(c)(2)." **A motion to approve the proposed amendment and the Committee Note as revised was approved without dissent.**

Information and Discussion Matters

Rules 1005 and 1007 and Official Form 10, Proof of Claim. The Committee discussed the inclusion of federal tax identification numbers other than social security numbers in captions and statements as provided in Rules 1005 and 1007. The Committee discussed the status of the proposed amendment to Official Form 10 to facilitate electronic filing. The Reporter stated that, if the amendment to Form 10 is published in August 2006, it can take effect at the same time as the related amendments to Rule 3001 which were published in August 2005. **The chairman referred these matters to the Subcommittee on Forms.** An amendment to Schedule I of Official Form 6 was requested by the EOUST and published in August 2004. As a result of the enactment of the bankruptcy reform act, the EOUST amendment was withdrawn and Schedule I was amended to require that married debtors in chapter 7, 11, 12, and 13 cases include their non-filing spouses' income, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. The amendment to Schedule I was effective on October 17, 2005. **The Committee endorsed the withdrawal of the EOUST amendment since it is no longer needed.**

Notice of Newly Discovered Assets. Bankruptcy Judge Dana L. Rasure wrote the Committee on behalf of the Bankruptcy Judges Advisory Group concerning timing issues raised by Rule 3002(c)(5). The Committee discussed the matter at the March 2005 meeting and referred it to the Subcommittee on Privacy, Public Access, and Appeals. **The Committee agreed to defer the matter pending the planned study of the time periods in all federal**

rules.

Separate Document Requirement. The Subcommittee on Privacy, Public Access, and Appeals has been considering whether Rule 9021 should be amended to address the impact of the recent revision of Civil Rule 58 and whether the separate document requirement should be modified in bankruptcy matters. Professor Resnick stated that many bankruptcy attorneys would be shocked to know that, if a judgment is not set forth in a separate document, judgment is not entered for purposes of appeal until 150 days after the judgment is entered on the docket. Judge Klein said the change in the Civil Rule, which is incorporated by Bankruptcy Rule 9021, took care of the problem because 150 days has passed by the time the appellate court sees the appeal. Because the subcommittee was unable to agree on whether any change is needed in the separate document requirement in bankruptcy matters and, if so, what change, the Chairman suggested taking no action at this time. Professor Resnick suggested referring the issue to the subcommittee to define what is a separate document. **The Committee agreed to refer the issue to the Privacy, Public Access, and Appeals Subcommittee.**

Additional Time to Appeal. The Subcommittee on Technology and Cross Border Insolvency and the full Committee have considered whether Rule 8002 or Rule 9006 should be amended to provide additional time for the appeal of judgments, degrees, or orders in bankruptcy cases. **The Committee deferred action pending the planned study of the time periods in all federal rules.**

Restyled Civil Rules. The Committee discussed the need to review the interplay between the restyled Civil Rules and the Bankruptcy Rules and to send any recommendations for changes in the restyled rules to the Civil Rules Committee by December 15, 2005. All Committee members volunteered to assist in the review. **The Reporter said he and the Chairman would divide the restyled Civil Rules and allocate them to groups of two or three Committee members and staff for review.**

Administrative Matters

The Chairman extended very special thanks for their service to the four members who are leaving the Committee: Judge Torres, Professor Resnick, Mr. Frank, and Mr. Adelman.

The Committee's next regularly scheduled meeting will be at the Carolina Inn, Chapel Hill, N.C., in March 2006. The Chairman stated that three days may be needed for the spring meeting. **Subsequent to the meeting, the Chairman scheduled the meeting for March 8 - 10, 2006.** The Chairman stated that, if a number of substantive comments are received on the Interim Rules and Official Forms, they may be set for a public hearing in Washington. The fall 2006 meeting will be in the West, possibly in Seattle, Jackson Hole, or the Napa Valley. The Chairman asked that Committee members email their preferences to him.

Respectfully submitted,

James H. Wannamaker, III

Bankruptcy Rules Tracking Docket (By Rule Number) 12/13/05

Approved Items

Suggestion	Effective Date
Rule 1007 Debtor to include in matrix name/address persons for schedules D-H	12/1/05
Rule 2002(g) Allow entity to designate address for purpose of receiving notices	12/1/05
Rule 3004 Debtor or trustee may not file proof of claim until creditor's time to file expires	12/1/05
Rule 3005 Conform to code	12/1/05
Rule 7004 Clerk can sign, seal, and issue summons electronically	12/1/05
Rule 9001 Notice provider definition	12/1/05
Rule 9006(f) Additional time after service by mail	12/1/05
Rule 9036 Notice by electronic means is complete upon transmission	12/1/05

Interim Rules, Forms, etc. Prompted by Bankruptcy Reform Legislation

Rules, Official Forms	Status Pending Further Action	Tentative Effective Date
Rules 1006, 1007, 1009, 1010,1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, 9009	8/05 - Approved by Committee as Suggested Interim Rules 8/05 - Approved by Standing Committee and transmitted to courts for adoption as Interim Rules 9/05 - Interim Rules 1007, 2002, 4004, and 8001 amended by Committee 10/05 - Amended Interim Rules approved by Standing Committee and transmitted to courts for adoption 3/06 - Committee agenda for review before publication as draft amendments to National Rules	10/17/05 as Interim Rules 12/1/08 as National Rules
Rules 2015(a), 3016(d)	8/05 - Approved request for publication as amendments to National Rules (not part of Interim Rules) 6/06 - Standing Committee agenda	12/1/08 as National Rules
ABA Task Force request concerning attorney compliance	9/05 - Referred to Subcommittee on Attorney Conduct and Health Care 3/06 - Committee agenda	
Official Forms 1, 3A, 3B, 4, 5, 6A-J, 7, 8, 9A-I, 10, 16A, 18, 19A, 19B, 22A, 22B, 22C, 23, 24	8/05 - Approved by Committee 8/05 - Approved by Standing Committee and Executive Committee of Judicial Conference as Official Forms 9/05 - Official Forms 1, 22A, and 22C amended by Committee 10/05 - Amended Official Forms approved by Standing Committee and Executive Committee of Judicial Conference 3/06 - Committee agenda for review before publication as draft permanent amendments	10/17/05 as Official Forms
Director's Forms 18J, 18JO, 18F, 18FH, 18W, 18WH, 201, 240	9/05 - Reviewed by Committee 10/05 - Issued by Director of Administrative Office	10/17/05
Form Plan and Disclosure Statement	9/05 - Model plan approved in principle 9/05 - Model plan and disclosure statement referred to Business Subcommittee 3/06 - Committee agenda	12/1/08

Form for report on value, operations, and profitability of related entities	9/05 - Referred to Business Subcommittee 3/06 - Committee agenda	12/1/08
Periodic report on small business debtor's profitability, cash flow, and compliance	9/05 - Referred to Business Subcommittee 3/06 - Committee agenda	12/1/08

Active Items

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 1005, 1007 Use of other taxpayer ID numbers		3/05 - Committee considered, referred to Subcommittee on Privacy, Public Access & Appeals 9/05 - Referred to Forms Subcomt. 3/06 - Committee agenda	
Rule 1009 Social security number - amended statement		4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval 6/05 - Standing Committee approval 9/05 - Judicial Conference approval	12/1/06
Rules 1010, 1011 Rule 7007.1 applied in involuntary cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee agenda	
Rule 1014 Clarifies that court may act *sua sponte* to dismiss or convert a case	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Approved by Joint Subcommittee 9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07

Rule 2002(g)(1) Address for notices	05-BK- D Judge Robert D. Martin Clerk Marcia M. Anderson 10/25/05	10/05 - Sent to chair and reporter 11/05 - Also sent to CM/ECF staff	
Rule 2021 Large chapter 11 case management and teleconferences	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/05 - Referred to Joint Subcomt. 3/06 - Committee agenda	
Rule 3001 Procedure for filing excerpts supporting proof of claim	04-BK-A Glen K. Palman for Claims Subcomt. of CM/ECF Working Group 2/19/04	9/04 - Committee considered, referred to Subcommittee on Forms 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07
Rule 3002(c)(5) Timing issues for notice of newly discovered assets	04-BK-E Judge Dana L. Rasure for Bankruptcy Judges Advisory Group 11/15/04	3/05 - Committee considered, referred to Privacy Subcommittee 9/05 - Deferred pending study of time periods in all federal rules	
Rule 3007(b) Procedure for objection to claim - no affirmative relief at same time		9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07

Rule 3007(c)-(f) Omnibus objections to claims	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcomt. 9/04 - Approved in principle by Committee 1/05 - Revised by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07
Rule 3007 Service of objections to claims	Judge Klein	9/05 - Referred to Business Subcommittee 3/06 - Committee agenda	
Rules 3020, 4001(a) Automatic stay terminated at confirmation	05-BK-C Nicholas P. Spallas 9/30/05	10/05 - Sent to chair and reporter	
Rule 4001 Requirements for cash collateral motions	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcomt. 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07

Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered, referred to Consumer Subcomt. 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval (as modified) 4/05 - Committee deferred action 8/05 - Included in Interim Rules	10/17/05
Rule 4003(b) Objection to exemptions in converted case	05-BK-B Judge Samuel L. Buford 9/15/05	9/05 - Sent to chair and reporter	
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Committee considered, referred to Consumer Subcomt. 11/04 - Approved by Subcommittee 3/05 - Committee approved in part, referred to Consumer Subcomt. for further study 9/05 - Committee approved for publication	
Rule 4003(d) Lien holder's objection to avoidance notwithstanding the 30-day limit	04-BK-B Judge Eugene R. Wedoff 2/17/04	9/04 - Committee considered as part of Rule 4003(b) amendment, referred to Consumer Subcommittee 3/05 - Committee considered, referred to Consumer Subcomt. 9/05 - Committee approved for publication	

Rule 4008 Reaffirmation agreement to be filed within 30 days of discharge	01-BK-E Bankruptcy Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered, referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 3/04 - Committee approval 6/04 - Standing Committee approval 9/04 - Judicial Conference approval 4/05 -Withdrawn from Supreme Court at request of Committee and Executive Committee due to conflicting provisions in bankruptcy reform legislation 3/06 - Committee agenda as part of review of Interim Rules	
Rule 5001(b) Holding court outside the district in an emergency		9/03 - Committee approved in principle; further action deferred 9/05 - Committee approved for publication	
Rule 5005(a)(2) Court may permit or require electronic filing	04-BK-D Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 9/04 - Committee approved for publication 11/04 - Publication on "Fast Track" (3 month comment period) 3/05 - Committee approval (as modified) 6/05 - Standing Committee approval 9/05 - Judicial Conference approval	12/1/06 Fast Track

Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel and District Judge to entities already listed	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee approved for publication 1/04 - Standing Committee approved for publication 8/04 - Published for Public Comment 3/05 - Committee approval 6/05 - Standing Committee approval 9/05 - Judicial Conference approval	12/1/06
Rule 6003 (new) First day orders	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcomt. 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for Public Comment	12/1/07
Rule 6006 Omnibus Motions to Assume or Reject	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcomt. 9/04 - Approved in principle by Committee 1/05 - Approved by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for Public Comment	12/1/07

Rule 7004(b)(9), (g) Service of summons and complaint on attorney for debtor	Committee proposal	3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval (as modified) 6/05 - Standing Committee approval 9/05 - Judicial Conference approval	12/1/06
Rule 7007.1 Corporate ownership statement with initial filing	Committee proposal	9/04 - Committee approval as technical amendment without publication 1/05 - Standing Committee approved publication 8/05 - Published for Public Comment	12/1/07
Rule 8002(a) Extending the appeal time	Committee proposal	9/04 - Committee considered, referred to Technology and Cross Border Insolvency Subcommittee 1/05 – Subcommittee recommended taking no action 3/05 - Referred to Technology and Cross Border Insolvency Subcomt. 9/05 - Committee deferred action pending study of time periods in all federal rules	

Rule 9005.1 (new) Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed Rule 5.1 1/05 - Standing Committee approved proposed Rule 5.1 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07
Rule 9021 Separate Document Requirement	04-BK- Judge David Adams	8/04 - Referred to Committee 9/04 - Committee considered, referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee approved in principle for contested matters, referred to Privacy, Public Access and Appeals Subcommittee 9/05 - Referred to Privacy, Public Access and Appeals Subcommittee 3/06 - Committee agenda	
Rule 9037 (new) Template privacy rule	E-Government Act § 205(c)(3)	9/04 - Committee considered and referred to Reporter, Judge Swain 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment	12/1/07

New Rule Representation of corporations in small claims matters	05-BK-A (see also 00-BK-D, 98-BK-A) Judge Paul Mannes	9/05 - Referred to Attorney Conduct and Health Care Subcommittee 3/06 - Committee agenda	
Official Form 10 Amend Proof of Claim form (See Rule 3001)	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair and Forms Subcommittee 9/04 - Discussed by Committee, referred to Forms Subcommittee 12/05 - Approved by Subcommittee 3/05 - Committee approved for publication 6/05 - Committee deferred action 9/05 - Referred to Forms Subcomt. 3/06 - Committee agenda	

Inactive Items / Historical Information

Suggestion	Docket No., Source & Date	Status
Rule 1019(3) Superceding claims required in cases converted chapter 7	04-BK-G Attorney Thomas Yerbich 11/8/04	3/05 - Committee considered, no action taken **NO FURTHER ACTION**
Rules 6004(a), 2002(c)(1) Sale of property	04-BK-F Judge Vincent Zurzolo 9/15/04	10/04 - Referred to reporter for review 3/05 - Committee considered, no action taken **NO FURTHER ACTION**
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK-005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee 9/04 - Committee deferred action **FURTHER ACTION MAY BE APPROPRIATE**

Rule 9036 Notice by electronic means is ineffective if sender knows notice did not reach intended recipient	Committee proposal (see 02-BK-A)	9/04 - Committee considered, referred to Technology Subcommittee 12/04 - Subcommittee discussion 3/05 - Committee consideration, no action taken **NO FURTHER ACTION**
Official Form 6, Schedule I Income of non-filing spouse disclosure	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval, chair given discretion to refer to Forms Subcommittee if legislation passes 8/05 - Included in revision for reform legislation **NO FURTHER ACTION**

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

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EVIDENCE RULES

To: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Lee H. Rosenthal, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 15, 2005**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee held a hearing at the University of Chicago Law School on November 18 to hear testimony on the Style set of the Civil Rules that was published for comment in February. The Rules published on the "Style-Substance Track" and the Style Forms also were discussed. The Committee met in Santa Rosa, California, on October 27-28. Draft minutes of the October meeting are attached. Summaries of the written comments and testimony on the Style Rules, the Style-Substance Track, and the Style Forms will be provided for the Standing Committee's spring meeting along with recommendations for the next steps in moving toward adoption of the Style Project proposals.

Part I of this report presents one action item, a recommendation to approve for publication a minor amendment of Civil Rule 8(c). The recommendation is for publication when this rule can be included in a package with other proposals.

Part II presents information items, describing the projects that are being developed for further consideration. Some of these projects may lead to recommendations for publication as early as next summer. Others are likely to require study that will extend beyond next spring. Some may be deferred or abandoned after further study.

I Action Item: Rule 8(c) Amendment Recommended for Publication

The Style Project raised two questions about the affirmative defenses listed as examples in Rule 8(c). "Contributory negligence" has become outmoded in most states, having given way to rules that in one way or another compare the role of both plaintiff and defendant in causing the plaintiff's injuries. A determination whether to recommend revision of Rule 8(c) on this point was deferred, however, for two reasons. There is no indication that anyone doubts that, for example, comparative negligence is an affirmative defense, captured either in "contributory negligence" or in the residual provision of Rule 8(c) that includes "any other matter constituting an avoidance of affirmative defense." An amendment, further, would require a choice either to substitute a more modern phrase or to avoid any reference at all. This defense is far more often invoked than many of the other matters used as examples in Rule 8(c), making deletion questionable. Substitution, however, would require a choice among comparative negligence, comparative fault, or — and most accurately — comparative responsibility. In many jurisdictions comparison extends beyond

negligence claims to claims based on "strict" liability, suggesting that "fault" might be more suitable. The comparison, moreover, commonly weighs not only relative degrees of departure from the required standard of care but also relative causal contribution, suggesting that "comparative responsibility" may be the best term. This question remains on the agenda.

"Discharge in bankruptcy," another item in the Rule 8(c) list of examples, is ripe for change. Early in the Style Project a bankruptcy judge advised that discharge in bankruptcy is no longer an "affirmative defense" as a matter of substantive bankruptcy law. For many years, 11 U.S.C. § 524(a)(1) and (2) and the predecessor statute have provided:

> (a) A discharge in a case under this title —
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of a personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived * * *.

Although § 524 runs on for many pages, Judge Walker, liaison from the Bankruptcy Rules Committee, affirmed that it means what it seems to say. A discharge voids any judgment obtained on the discharged debt even if the debtor defaults or appears but fails to plead the discharge. The discharge, indeed, operates as an injunction that makes it a contempt to initiate or pursue an action on the discharged claim, again whether or not the debtor fails to plead the discharge.

Section 524 has superseded the role of discharge as an affirmative defense. Rule 8(c) should be amended by deleting the reference to "discharge in bankruptcy." Publication of the proposed amendment, however, can safely await the next package of published proposals. The existing provision has survived for many years after it became irrelevant without causing any observable problem.

II Information Items

A. Style Project

Two of the three scheduled hearings on the redrafted rules proposed by the Style Project and published in February were cancelled because no one requested to testify. One hearing was held in Chicago on November 18.

The Chicago hearing took on the character of a roundtable discussion more than the traditional testimonial presentations. Professor Stephen B. Burbank of the University of Pennsylvania Law School and Gregory P. Joseph, of the New York Bar, discussed Style Project issues for a full morning. They presented comments provided by a working group of 21 academics and practicing lawyers who divided up the complete set of Style Rules and Style-Substance Rules for intense study by teams that paired an academic with a practicing lawyer. Their work on the individual rules, and the thoughtful presentation of the results, were exactly the sort of painstaking study and analysis that a successful Style Project will depend upon. The Rules Committees owe them a real debt of gratitude for their work and for traveling to Chicago to discuss it. Many improvements will result from it.

Professor Burbank and Mr. Joseph also presented a brief summary of the working group's division of opinion on the wisdom of completing the Style Project. A majority of the fourteen members who participated in the group's final conference call concluded that the transaction costs of implementing a complete set of newly worded rules will outweigh the advantages in clarity, simplicity, and consistency that have been achieved in the styling process. A smaller set of members believe that the transitional costs will be outweighed by the long-term benefits. The fervor of these conflicting views varied among members of both groups. Similar expressions of doubt and enthusiasm have become familiar from the time of the first tentative beginnings of the Style Project revision of the Appellate Rules. They must be confronted again, and finally, when the final and best version of the Style Civil Rules is presented for deliberation at the spring meetings of the Advisory Committee and then the Standing Committee.

B. Discrete Issues

General Docket

Thirty-three items that have lingered on the Civil Rules docket were removed from the docket. Some of them offered worthy concerns. But it is not desirable to continually amend the rules to respond to every possible improvement. Neither is it desirable to respond whenever a single decision — or even a few decisions — seem to have misinterpreted a rule.

Rule 15

Several Rule 15 suggestions have accumulated over the last few years, including some that emerged from the Style Project. Two have stimulated particular interest. The first of these focuses on the distinction drawn among the events that terminate the Rule 15(a) right to amend once as a matter of course. A responsive pleading — most often an answer — terminates the right. But a motion to dismiss for failure to state a claim is not a pleading, and does not terminate the right. Amendments at times are made as a matter of right after a motion to dismiss has been submitted for decision. Some judges have provided written suggestions that this part of Rule 15(a) should be reconsidered. The second suggestion focuses directly on the interpretation of the part of Rule 15(c)(3) that allows relation back of an amendment changing the party against whom a claim is asserted if the party had timely notice that "but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party." Many circuits have ruled that relation back is not permitted if the party asserting the claim knew that it did not know the identity of an intended defendant — that is not a "mistake," but a lack of information. Judge Edward Becker has urged the Committee to propose amendments to reverse this interpretation.

These and other Rule 15 questions were submitted to a Subcommittee a few years ago, along with a Rule 50(b) question that has led to the proposed amendment now pending in the Supreme Court for adoption. The Subcommittee concluded that the Rule 15 questions were sufficiently complicated to demand greater attention than could be afforded in competition with such other topics as discovery of electronically stored information and civil asset forfeiture procedure. A new Subcommittee has been named and will again take up these topics. The open questions are not only whether any change is worthwhile but also whether there is any advantage in exploring the many conceptual difficulties that can be found in Rule 15(c) so long as there is no significant evidence that the abstract gaucheries have caused any real problem in practice.

Rule 26(a)(2)(B): "Regular Employee" Expert Witness Reports

Rule 26(a)(2)(B) requires disclosure of a detailed report by an expert trial witness who falls into either of two categories — a witness "retained or specially employed to provide expert

testimony in the case," and one "whose duties as an employee of the party regularly involve giving expert testimony." The suggestion for revision of this rule came in the form of a law review article submitted by the authors. The article finds many decisions that in effect rely on the great value of the disclosure requirement to conclude that the rule also requires disclosure of a report by an employee whose duties do not regularly involve giving expert testimony. At the same time, other decisions read the rule as it was written, though at times suggesting that it would be better to require a report. Although an employee disclosed as an expert trial witness under Rule 26(a)(2)(A) can be deposed directly under Rule 26(b)(4)(A) if a report is not required by (b)(2)(B), the report is thought useful as preparation for the deposition (the hope that a report may obviate the need for a deposition seems not to be fulfilled very often).

This topic will be developed further. One of the reasons offered to support a report requirement is the desire to win access to privileged information used to prepare an expert trial witness. It may be, however, that the disclosure rule as such is not the source of waiver — the same access should be available whether the trial expert discloses a report, is deposed, or testifies at trial. More importantly, privilege questions may be much more difficult when the trial expert witness also is a regular employee who has not been transformed into the practical equivalent of an outside expert specially retained or employed for the case. The regular employee may be immersed in all aspects of the situation, going back even before the events in suit occurred, and be a necessary participant in many privileged communications and in protected trial preparation efforts. Privilege concerns, moreover, invoke obvious interests of the Evidence Rules Committee. The issues are likely to prove difficult.

Rule 30(b)(6): Organization as Deponent

The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York Bar Association has suggested that growing misuses are made of the Rule 30(b)(6) procedure for naming an organization as a "deponent." In the end, after suggesting many best-practice guides, their submission proposes a single amendment that would limit the subject of the deposition to "factual" matters. This proposal reflects a specific concern that Rule 30(b)(6) depositions are being used to bind an organization to positions, including legal contentions, taken by its designated witnesses. Occasional suggestions have been made by others that Rule 30(b)(6) practice has evolved in undesirable ways that go far beyond anything originally intended, changing a targeted discovery rule to a broad rule of both discovery and evidence.

David Bernick agreed to attend the October meeting to provide some practical insight into the current uses of Rule 30(b)(6). He observed that significant difficulties arise from the requirement that the organization designate witnesses to depose "as to matters known or reasonably available to the organization." The organization, as a legal construct, "knows" often vast amounts of information that are not within the personal knowledge of any single real person or any manageable number of real persons. The designated witnesses must be educated in the relevant corporate knowledge, even though they would not be individually qualified as witnesses on the same "matters." The risks inherent in this device are magnified by efforts to force the individual witnesses to state the organization's positions on matters as to which the organization has conflicting information, and also to state contentions of a sort properly subject to discovery by interrogatories or by requests to admit but not by deposition. The rule continues to have a proper purpose as a cure to the difficulties an outsider faces in attempting to identify the sources of information available to an organization. But it should be limited to that purpose. It could be amended to authorize a deposition "to ascertain the location of facts discoverable under these rules and within the custody or control of the organization." The designated witnesses would have to be educated to identify the relevant persons and documents, but not to recite all of the matters known to those persons or contained in the documents.

The discussion showed that this is a big and potentially troubling topic. It may overlap with interests of the Evidence Rules Committee. It will be studied further. A subcommittee has been formed to study the practice under Rule 30(b)(6) and whether rule amendments should be pursued.

Rules 33, 36: Attorney Signature on Response

A first semester law student pointed out a puzzle in the relationships among Rules 26(g)(2), 33, and 36. Rule 26(g)(2) says that a discovery response must be signed by an attorney unless the party is unrepresented. The Committee Note says directly that "response" includes answers to interrogatories and requests to admit. Rule 33(b)(2), however, in language adopted before the 1983 adoption of Rule 26(g)(2), says that answers to an interrogatory are to be signed by the person making them, while objections are to be signed by the attorney making them. Rule 36(a) says that an answer or objection addressed to a request to admit is to be "signed by the party or by the party's attorney." Since Rule 26(g)(2) is the most recent of these three rules, it might seem that it should govern. On that view, the only question is whether Rules 33 and 36 should be amended to make clear the rule that an attorney must sign Rule 33 and Rule 36 responses. Discussion, however, reflected real doubt whether an attorney should be required to sign answers to interrogatories or requests to admit. The conclusion was to carry this subject forward, but to hold it in abeyance until there is some sign of real difficulties in practice.

Rule 48: Jury Polling

The Committee discussed favorably a proposal to adopt a rule on jury polling parallel to Criminal Rule 31(d). It is expected that a draft will be prepared for the spring meeting with an eye toward recommending an amendment for publication in 2006.

Rules 54(d)(2), 58(c)(2), Appellate Rule 4

The Appellate Rules Committee, reacting to the opinion in *Wikol v. Birmingham Public Schools Bd. of Educ.*, 360 F.3d 604 (6th Cir.2004), has suggested that Civil Rule 58(c)(2) be amended. Rule 58(c)(2) provides that when a timely motion for attorney fees is made under Rule 54(d)(2), the district court "may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect" under Appellate Rule 4 as a timely Rule 59 motion. This provision was adopted to bring some flexibility to administration of the rule that a decision that disposes of all issues other than attorney fees is a final judgment — if appeal is not taken within the time measured from judgment on the merits, the right to appeal on the merits is lost. The trial judge is put in the role of "dispatcher," vested with discretion to determine whether it is better to wrap up the entire dispute in a single package that will support a single appeal, or whether it is better instead to have the appeal on the merits proceed while the fee question remains pending and perhaps stayed pending the outcome on appeal.

The difficulty arising from this structure is simply another illustration of the problems that arise from two related phenomena. One is the rule, adopted as a matter of interpretation rather than statutory mandate, that the appeal times designated in Appellate Rule 4 are "mandatory and jurisdictional." This rule itself is called into doubt by the decision in *Eberhart v. U.S.*, 2005, 126 S.Ct. 403. The other is the sets of rules that govern the initiation, suspension, and running of appeal time. These rules have been constantly amended in an effort to provide inescapable clarity and sound results. Such clarity as has been achieved, however, is attainable only on close and careful reading. So it is with the effect of a motion for attorney fees. Careful reading through four rules tells the parties and court what to do in almost all situations. But careful reading is required in an area

that is not routinely familiar to most attorneys — not even those who practice regularly in federal court.

In the case of Rule 58(c)(2), careful reading suggests a question that is not directly answered. What happens if there never is a notice of appeal that "has become effective"? The simple testing illustration is this: Judgment on the merits enters. A timely motion for attorney fees is made and resolved. The time to appeal runs out both as to the judgment on the merits and as to the order deciding the fee motion. Then a party moves for an extension of appeal time under Rule 58(c)(2), arguing that the court has authority because it can act before a notice of appeal has become effective. To be sure, a district court is not at all likely to grant such a motion unless there is some other reason to wish to extend appeal time. And it can be argued that the rule contemplates an order that suspends appeal time — the effect of a timely Rule 59 motion — only so long as it remains possible to file a notice of appeal that can become effective. This potential gap in present drafting may not present a real problem in practice. (The court managed to find a workable answer for the different problem actually presented by the *Wikol* case.)

Discussion of possible drafting alternatives pointed up the need for information about the ways Rule 58(c)(2) is used in practice. Do district judges commonly suspend the time to appeal on the merits? Commonly refuse to do so? Make sensitive and case-specific rulings that demonstrate the value of the subtle flexibility established by the present rule? Before proceeding further with this topic, the Federal Judicial Center will be asked whether it is possible to design and carry out a study that will shed more light on present practice. The topic also relates to the Time Project, however, and may in any event return for discussion as the Advisory Committee reviews all of the individual time periods established in the Civil Rules and — where indicated — their relationships to the time periods established in the Appellate Rules.

Rule 60 or "62.1" — "Indicative Rulings"

The Advisory Committee has for some time deferred action on a proposal submitted by the Solicitor General to the Appellate Rules Committee and referred on for consideration in the Civil Rules. The simplest part of the proposal is to adopt a rule that expresses the practice adopted in most circuits for district-court consideration of a Rule 60(b) motion to vacate made while an appeal is pending from the judgment addressed by the motion. Most circuits rule that the district court has jurisdiction to deny the motion, and also to indicate that it would grant the motion if the case were remanded. Adoption of this practice in an express Rule 60 provision could make it uniform across the country, inform many lawyers and some judges who are not aware of it, and provide clear guidance on procedural incidents. A more complex provision could seek to establish this "indicative ruling" procedure for all circumstances in which a pending appeal ousts district-court jurisdiction to amend, modify, or vacate an order that is the subject of a pending appeal. The same procedure may well fit across many different categories of appeal jurisdiction. The potential challenge lies in confining a general rule to the circumstances in which it is needed. District-court authority to act is governed by complex rules developed in the case law for different categories of appeals taken before a truly final judgment that concludes all district-court proceedings. The challenge appears to be more a drafting challenge than anything else, at least if it seems wise to leave the underlying questions of authority for continuing development in the decisions.

At least two draft rules will be considered at the spring meeting for a possible recommendation to publish for comment. One will be a simple Rule 60 approach. The other will be a more general model that addresses any situation in which the district court lacks jurisdiction to take requested action without appellate permission.

C. Long-Range Projects

Two long-range projects are being considered for possible development. One, to evaluate the operation of Civil Rule 56, will begin by opening all questions that might be addressed to the rule. Further study, however, may show that the project should be narrowed to focus on the procedures that govern summary-judgment practice and particularly to consider the time periods that in any event must be considered as part of the Time Project. The other, and more fundamental, will ask whether the time has come to revise the notice-pleading part of the basic pleading-discovery package that transformed contemporary procedure with the adoption of the Civil Rules in 1938.

Summary judgment has a rather recent history in the amendment process. A complete revision of Civil Rule 56 was proposed by the Rules Committees but rejected by the Judicial Conference in September, 1992. There are indications that the rejection rested on one facet of the proposals — a perception that the revised Rule 56 accurately restated the summary-judgment test that emerged from three 1986 Supreme Court decisions. This perception in turn led some participants to believe that there was no need to restate established law, while others thought it undesirable to restate and entrench undesirable established law. However that may have been, the question remains today whether Rule 56 is ripe for further consideration. The examination of the rule in the Style Project provided fresh reminders of problems, ranging from unreasonable deadlines to a disconnect between the rule and the ways in which summary judgment motions are litigated – the rule, for example, does not even refer to "partial summary judgment." The large number of specific local rules on Rule 56 motions further demonstrates the inadequacy of the national rule.

Discussion ranged across a full range of issues identified in the earlier proposal. The prospect of restating the standards for summary judgment or addressing other central issues met some reluctance, but was not ruled out. The possibility of "procedural" changes was recognized. The Time Project will require reconsideration of the time periods set for making and responding to summary-judgment motions. Many districts have adopted local rules that flesh out detailed procedures for supporting a Rule 56 motion and for opposing it. The felt need for added detail may suggest that Rule 56 should be revised both to give greater guidance and also to establish more nearly uniform national practices. But there also was some wariness about spelling out detailed procedural requirements in a national rule.

Summary judgment remains on the active agenda. The Federal Judicial Center will be asked to provide at least such help as can be on the basis of ongoing studies of Rule 56, and perhaps will be asked whether some expanded empirical project might be worthwhile. Local rules and perhaps some standing orders will be collected to provide a full picture of the models that might be drawn upon in expanding Rule 56's procedural details.

Notice pleading has been briefly considered in recent years. The immediate promptings have been Supreme Court decisions that reject "heightened pleading" requirements in any area not specifically addressed by a Civil Rule. Deeper concerns have occasionally emerged in the course of ongoing efforts to revise the discovery rules. The combination of notice pleading with broad discovery forms the center of federal civil practice. Concerns that discovery has come to impose undue burdens in a relatively small but worrisome fraction of cases have not yielded fully satisfactory revisions of discovery practice. The Advisory Committee's responsibility to aid in the Judicial Conference's "continuous study of the operation and effect of the general rules" suggests that it is time to ask whether notice pleading might be reconsidered, at least in some respects.

Initial exploration of these questions recognized that notice pleading is no longer used in many cases. In cases that do use notice pleading, discussion reflected a desire for better tools for early management of cases that survive for longer, and at greater expense, than they should. An

alternative might be to revise Rule 12(e). Rule 12(e) now recognizes the motion for a more definite statement only when a pleading is so confused that a responsive pleading cannot reasonably be prepared. It might be developed into a flexible tool for demanding more specific pleading in individual cases that seem likely candidates for disposition on the pleadings because a party is not willing even to plead elements that must be proved to establish a claim or defense. Or it may be that lower courts generally manage to administer "notice" pleading so as to require more detailed allegations "showing that the pleader is entitled to relief," obviating the need for any rules changes.

These questions connect to the summary-judgment questions, both in theory and in the prospects for the early steps of further research. A survey of local rules and standing orders might well include not only the well-known summary-judgment procedure rules but also rules or orders that address pleading in specific categories of cases. Beyond that, it may be feasible to do an electronic docket search that gives some sense of what kinds of pleading motions are being made and how they are decided. One or more conferences similar to those so helpful during the consideration of the 2000 discovery amendments, the 2003 class-action rule changes, and the proposed electronic discovery proposals, may further illuminate whether there are a significant number of cases that courts should be able to decide on the pleadings but that persist beyond the pleading stage to inflict unnecessary expense and delay, and whether amendments can solve this problem without also dispatching on the pleadings cases that should survive for further development. The topic remains interesting and important.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 27-28, 2005

The Civil Rules Advisory Committee met on October 27 and 28, 2005, at the Vintners Inn in Santa Rosa, California. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. David Bernick, a former member of the Standing Committee, also attended. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeff Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., attended as an observer.

Judge Rosenthal opened the meeting by introducing new members Campbell and Gensler. She noted that the members they replaced, Dean John Jeffries and Judge Shira Scheindlin, were each unable to attend this meeting, but that Judge Scheindlin expects to attend the November 18 Style Project hearing. Both Dean Jeffries and Judge Scheindlin sent messages to express their appreciation of the years they spent working with the Committee.

November 18 Style Rules Hearing

It seems likely that the November 18 hearing will be the only one of the three scheduled Style Project hearings to be held. The November 18 hearing will focus on a presentation of the work done by a group organized by Professor Burbank and Gregory Joseph. Several teams, each composed of one academic and one practicing lawyer, divided the rules among them. They have prepared a thorough, rule-by-rule, study of the published Style Rules. The study looked for possible changes of meaning and also sought still better ways of restyling. They also have deliberated on the wisdom of undertaking the Style Project. The Committee is extraordinarily grateful to them for undertaking this work. The format of the November 18 "hearing" will not be the usual "witness-testimony" format. Instead, it will be more in the form of roundtable discussion.

One of the questions to be addressed in November will be the question whether the Style Project might have unintended supersession effects. The concern is that because all of the Civil Rules will, according to the intended schedule, take effect as a package on December 1, 2007, some rules may supersede statutes enacted after the day an inconsistent rule provision was originally adopted. This would reverse the situation on November 30, 2007, when the inconsistent statute would have superseded the earlier inconsistent rule provision. An example is provided by Rule 11. Rule 11 was last amended in 1993. The Private Securities Litigation Reform Act was enacted in 1995, including provisions that supersede inconsistent provisions in Rule 11. The argument might be made that Style Rule 11 will come to supersede the 1995 statute.

Brief discussion pointed out three matters of common agreement within the Committee. First, the Style Project is not intended to effect any change in the supersession effects of any rule. Each rule should have the same supersession effect on December 1, 2007, as it had on November 30. This conclusion inheres in the purpose to restate the rules' language without any change of meaning. Second, the Style Project can be accomplished without changing the supersession effect of any rule. Third, the question remains open as to how best to ensure the intended non-effect. It would be possible to expand the first paragraph of the Committee Note to each rule that explains the

purpose of the Style changes; the alternative of providing the additional explanation only in the Committee Note to Rule 1 would save many repetitions, but might not draw attention when arguments are made about the supersession effects of a particular rule and statute. A second approach would be to include a statement of the null effect in the Supreme Court Order that transmits the Style Rules to Congress. This would be clear, but could easily become even more obscure to most lawyers and judges than a statement in the Rule 1 Committee Note. A third approach would be to include the statement in Style Rule 86, which addresses the effective date of rules amendments. Perhaps some other approach may be found. The question is how to establish an accessible rule of interpretation.

Discussion noted that the only similar question to arise with either the Appellate Rules or the Criminal Rules focused on Criminal Rule 48(b) and the Speedy Trial Act. The Criminal Rules Committee decided to restyle the rule, but not to attempt to revise it to conform to the statute. They attempted to make clear the intent to have no effect on the relationship between statute and rule. There has not been any hint that this approach has led to any difficulty.

The first signs of the overall reactions of the Burbank-Joseph group indicate that individual views on the wisdom of the Style Project vary. Some are enthusiastic. Others are mildly uneasy. Still others are opposed, some strongly. There has not been time yet to evaluate the direct responses on a rule-by-rule basis — they have only just arrived — but a quick initial scan shows both familiar issues and new issues. There do not seem to be great difficulties on the individual rule level.

April Meeting Minutes

The draft minutes for the April 14-15, 2005 Committee meeting were approved, subject to technical corrections.

September Judicial Conference

Judge Rosenthal reported that all of the Civil Rules amendments proposed for adoption by the Standing Committee were approved on the Judicial Conference consent calendar. The amendments included the several rules changes dealing with discovery of electronically stored information, new Supplemental Rule G on civil asset forfeiture, and amended Rule 50(b) to enhance the procedure for renewing a motion for judgment as a matter of law after submission to the jury.

Judge Levi observed that the June Standing Committee agenda was the fullest in memory. The Evidence Rules Committee brought up four rules to resolve longstanding circuit conflicts. One that caught particular attention deals with the admissibility in later proceedings of statements made in settlement discussions. This proposal also was approved on the Judicial Conference consent calendar.

The Bankruptcy Rules Committee has been incredibly busy. The new bankruptcy legislation requires rules changes and new forms within six months. Approximately ten years worth of rulemaking was accomplished in four months, leaving time to disseminate the results. The rules and forms alike deal not only with complex technical issues, but also with important policy questions.

Appellate Rule 32.1 was very controversial in the Judicial Conference. Four circuits do not permit citation of "unpublished" opinions; nine do. The leading opponent of Rule 32.1, which allows parties to cite "nonprecedential" opinions, concluded his remarks by observing that the rule would be retroactive. A motion to make the rule prospective was not much opposed. Having agreed that the rule would require the circuits to allow citation only of opinions adopted after the rule takes effect, the Conference overwhelmingly approved the rule.

Judge Rosenthal added that the Standing Committee spent a lot of time on the electronic-discovery rules. As challenging as these were, they were all approved and no Judicial Conference member sought to take them off the consent calendar. Informal expressions by several members well-informed on electronic-discovery issues indicated that they had planned to move the rules to the discussion calendar, but that careful study of the proposals showed that they were much improved from earlier versions and did not require discussion. That is a great compliment to the way the process worked, not only with the hard work in the Advisory Committee and Standing Committee, but also in the thoughtful work done by so many participants in the public comment period and in the several meetings that prepared the way before the rules were published.

It was noted that several rules changes will take effect on December 1, 2005. One is a new Rule 5.1, expanding the procedures that implement the right of the United States Attorney General or a state attorney general to intervene in litigation that includes a challenge to a federal or state statute. The others clean up small details. The package headed toward an effective date of December 1, 2006, includes many broader changes.

Legislative Report

John Rabiej reported that this Congress again is considering a bill to restore mandatory sanctions to Rule 11. Among other provisions it would require suspension from practice after "three strikes." Similar bills have been introduced in earlier Congresses, always in the House; a bill passed the House in the last Congress, but was not taken up in the Senate. The Administrative Office has again sent a letter expressing Judicial Conference opposition to the legislation, including an account of the Federal Judicial Center survey that showed overwhelming support among federal judges for the 1993 Rule 11 amendments. The House is likely to vote on the bill soon, and to send it to the Senate.

E-Government Rules

Judge Fitzwater noted that the E-Government Rules, including Civil Rule 5.2, have been published. He attended a Courtroom 21 conference last week where the rules were discussed. The "two-tier" provision of Civil Rule 5.2, presumptively limiting remote public electronic access to records in social security and immigration cases, drew the most comment. The conference group included people who have strong interests in public access to court records and who fear that this provision is at the top of a slippery slope that will lead to additional restrictions on remote public access.

Administrative Office

Peter McCabe observed that there is a budget crisis throughout the judiciary. The Administrative Office has many open positions. But Jeff Barr will be working with the Rules Office on a regular basis.

Advisory Committee and Standing Committee agenda materials soon will be available on line.

Old records, back to 1934, are gradually being put into electronic form. Some records continue to be missing, but real progress has been made.

The Rules website is being used a lot more now. It will prove to be an invaluable research tool as more and more information is made available. The research will be particularly helpful in enabling retrieval of the work of earlier committees on topics that relate to current projects. If Rule 56 is restored to the active agenda, for example, the extensive work that went into the proposal that failed of adoption in 1991 will be a great help.

Federal Judicial Center Report

Judge Rosenthal prefaced the Federal Judicial Center Report by noting that the Judicial Conference is committed to study the Class Action Fairness Act's impact on federal courts. This Committee will be involved. The study will help to illuminate additional resource needs that may emerge from an increase in federal-court class actions. In addition, the Act requires a report on good settlement practices within 12 months. Beyond that, the Act may generate practices that have a general impact on Rule 23, showing a need for further work on Rule 23.

Thomas Willging described the FJC proposal distributed to the Committee as an overview of the study design. Other Judicial Conference committees will focus primarily on the impact of CAFA on federal-court resources. It is important that the study also do what it can to shed light on rule-based issues.

The study will focus on three aspects of impact. One is the impact on filings — how many new class actions are brought to federal courts as a result of CAFA? How can the incremental CAFA filings be distinguished from natural growth in class actions? The increment cannot be measured directly, but it may be approximated through a process of triangulation. One factor will be whether the action involves state claims — but if federal claims are included, it will remain uncertain whether the federal claims were added only because the plaintiff anticipated that the action would in any event wind up in federal court. Distinctions will be drawn between cases originally filed in federal courts and cases brought to federal courts by removal. The types of action will be considered, in such categories as personal injury, product liability, property damage, and so on. Trend lines in filings for these various types of actions will be considered; we know that class-action filings increased in the 10 years before CAFA, and can account for that in projecting what would have happened without CAFA.

A second aspect of impact will be at the motions level and beyond. Are there more motions to dismiss or to remand? For class certification? To approve settlements? What types of classes are defined — nationwide, statewide, or something else? Comparisons at the motions level will be difficult. The study will compare the two years from February 18, 2003 through February 17, 2005 with the two years from February 18, 2005 through February 17, 2007. This will not be a direct measure of CAFA's impact, but it will shed some light. This is a fast-moving field.

At the appellate level, there will be a new form of appeal jurisdiction from orders granting remand — how many appeals are sought? How many are granted?

The study will be able to generate preliminary information about filing and removal rates within a few months. But more complete information will take 2 years, 3 years, or even longer. The study cannot be rushed without skewing the information provided.

Discussion began by noting that apart from the jurisdiction provisions, CAFA includes other provisions that bear more directly on Rule 23 practice. Coupon settlements and attorney fees are regulated. Notice of settlements must be given to public authorities. Section 1715(b)(5) goes beyond Rule 23(e)(2) in requiring notice of "side agreements." This and other provisions could affect opt-out choices. It is possible that the impact on federal courts will be shaped by the desire of all parties to be in state court, where it may be easier to achieve a binding settlement.

Discussion continued by noting that some of the inconsistencies between CAFA procedures and Rule 23 may not affect many cases. The "Bank of Boston" provision, for example, § 1713, allows approval of a settlement that obliges any class member to pay sums to class counsel that would result in a net loss to the class member only on a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss. This sort of settlement will not occur

frequently, if ever. Some of the information that must be provided to federal and state officials on settlement will be difficult to get; it is beyond what Rule 23(e) requires. The cost of not providing it is that people are not bound by the settlement; this may create an incentive to avoid federal court. It has been rare to dismiss an action after certification in order to refile in state court; if that starts to happen, it may be a good sign that these CAFA provisions are having an impact on practice.

There is a lot of CAFA case law so far, but it focuses on the effective date, including the impact of Rule 15 relation-back concepts on amendments made after the effective date in actions filed before the effective date. It focuses also on assigning the burden on a motion to remand — does it lie on the removing party, or on the party who seeks remand?

It was noted that the study will be able to show appearances by the officials who get CAFA notices.

The study also will be able to show whether actions seem to concentrate in particular federal courts.

It was further noted that Rule 23 proposals have been kept on hold to see how the Amchem decision plays out. Experience under CAFA may help to show whether these questions should be taken up again.

One troubling question is what happens when the parties stipulate to certification of a class for purposes of seeking approval of a proposed settlement but the settlement is not approved. Should they be estopped from questioning certification of the same class for litigation purposes? A much-criticized Seventh Circuit decision says that agreement on a class definition and certification for settlement should remain binding even if the settlement is not approved. It was noted that this can be a real problem for a defendant — once you start down the settlement road, you need to define a class you can live with. But it should remain possible to argue that a class that is manageable for settlement purposes is not manageable for trial.

Another observation was that it will be interesting to see what unintended effects CAFA will have. One possibility is that the parties will "park" cases in state courts to provide an escape from federal court. Having settled, they may prefer to seek approval in a state court to avoid the possible disruption of notice to government officials; when the settlement is mutually desired, no party has an incentive to remove the action to federal court even though CAFA removal would be available.

CAFA also may lead to more frequent and more sophisticated attacks on settlements, not only by public officials but by other objectors. A lawyer connected to a state attorney general will be able to get authority to appear for the attorney general, mounting a well-financed attack. "The stakes will increase." "Bad" objectors may gain increased influence.

Agenda — General

Judge Rosenthal introduced the agenda by noting that this meeting provides a contrast to the intense work at recent meetings to advance proposals dealing with major, complex, and often controversial topics. There will be a lot of final-stage work on the Style Project over the next several months, but the time has come to draw back a bit to consider what topics might be addressed next.

The agenda book presents three types of materials. First are a number of lingering agenda suggestions that might be dropped from the docket for lack of foreseeable interest over the next few years.

A second type involve a number of discrete topics that have been considered at intervals, without ever benefitting from sufficient time for an informed decision whether to develop a concrete

proposal or to move on without proposing changes. Included in this group are such topics as "indicative rulings"; pleading amendments, both in general and with respect to relation back; jury polling; and Rule 30(b)(6) depositions of an organization.

The third set of topics includes longer projects. The time counting project has been launched by appointing a subcommittee that crosses the several advisory committees. Judge Mark Kravitz chairs the subcommittee; Chilton Varner is the Civil Rules member. The subcommittee has developed a template for common issues that span the several sets of rules. The template will be submitted to the advisory committees for consideration at the spring meetings. Once methods of computing time are set, each advisory committee will consider the need to adjust specific time periods in its own set of rules. For the Civil Rules, consideration of specific time periods will extend beyond simple accounting for changes in the computation rules. Some of the specific periods present obvious problems — indeed the problems are so apparent that no one expects them to be observed.

Two other possible long projects include reconsideration of notice pleading and revising the procedures that surround summary judgment. These projects would consider basic issues of how courts decide cases, and the ways in which parties and lawyers litigate. For many years various groups have asked that these topics be seriously considered. The present purpose is not to decide what the outcome might be, nor even to decide immediately whether to commit to a full-blown project. Instead the purpose is to begin deliberating the question whether one or both of these subjects is ripe for further work in the near future.

Finally, the Class Action Fairness Act may provide an occasion for deciding whether we should soon return to the class-action provisions of Civil Rule 23. It is too early even to guess what impacts it will have, but the consequences may generate new issues that will require consideration.

Time Project

Chilton Varner reported on the work of the Standing Committee Subcommittee that is directing the time project. The Subcommittee is primarily responsible for achieving a uniform approach by the several advisory committees to the rules that govern time computations. In addition to uniformity, simplification is an important goal. The specific periods allowed for specific procedures are left to the primary responsibility of each advisory committee.

The Subcommittee has met once and has reached consensus on a number of issues. Many issues have presented no problem. All the sets of rules, for example, agree that the day from which a time period runs should be excluded in computing the period.

The "11-day" rule, on the other hand, is confusing. This is the rule that excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11 days. [In the Bankruptcy Rules the period is less than 8 days.] It is counter-intuitive that a 14-day period often can be shorter than a 10-day period. The Subcommittee believes that "days should be days." If that approach is adopted, the Appellate Rules Committee can revise the few Appellate Rules that deliberately refer to "calendar days" in order to escape the 11-day rule.

The Subcommittee has agreed that the changes in time-computing rules should be made simultaneously in all of the individual sets of rules. As a practical matter that will require that all of the work in reconsidering specific time periods will have to be done by a single effective date. Eliminating the 11-day rule, for example, would have a dramatic effect on the meaning of the many 10-day periods in the Civil Rules. Many of those periods should be reconsidered before the new computing rule takes effect.

There is continuing uncertainty as to what should be done with the rules, such as Civil Rule 6(a), that excuse filing on a day when the clerk's office is inaccessible because of "weather or other conditions." Electronic filing tests this rule in at least two directions. In one direction, difficulties with computer systems may mean either that the court's system is unable to accept filings or that the filer's system is unable to transmit a filing. In another direction, the court's computer system may be accessible for filing when weather or other conditions prevent access to the clerk's office. It is not clear whether the time has come to adapt these rules to the circumstances of electronic filing.

The Subcommittee began with a disposition to eliminate the provisions such as Civil Rule 6(e) that allow an additional 3 days for filing after service by any means other than personal service. But study has suggested that there may be difficult issues here; no resolution has been reached. It may be that this question is bound up with disposition of the individual time periods allowed by specific rules — they may be made sufficient to allow for delays in transmission by mail, computer malfunctions, and the like. At the same time, elimination of Rule 6(e) and parallel rules might tempt lawyers to pick a mode of service that as a practical matter reduces the time available to respond.

Another issue that needs consideration is the handling of periods expressed in hours. Some statutes are beginning to adopt such periods. If the final hour falls on a Saturday, Sunday, or legal holiday, when should the constructive concluding hour run?

Another set of problems arise from "backward-looking" deadlines, such as the Civil Rule 56(c) requirement that a summary-judgment motion be filed at least 10 days before the time fixed for a hearing. The difficulties arise because often there is not a fixed date to count back from.

Discussion began with the observation that time rules are very important. Lawyers devote great effort to calculating time periods, yet mistakes are made. And periods expressed in terms of service can raise difficult fact disputes; when a period can be measured with respect to filing there is a clear event that the court knows without difficulty.

Another set of questions may arise from the scope of the time rules. Civil Rule 6(a), as parallel provisions in other rules sets, applies to computing time periods set by statutes. This aspect of the rule may generate some unanticipated consequences.

Yet another set of questions arises from the Civil Rule 6(b) combination of generous provisions for extending time periods with a flat prohibition on extending the times for motions under Rules 50, 52, 59, and 60. The prohibition generates two kinds of problems. One is that lawyers frequently overlook this rule, seeking extensions that cannot be given. When on occasion a judge cooperates in overlooking the rule, the consequence can be loss not only of the right for post-judgment relief but also loss of the right to appeal. The other problem is that the 10-day periods provided in Rules 50, 52, and 59 may be too brief to support effective motions in complex cases. District courts can circumvent this problem by the expedient of delaying entry of judgment, but that approach requires that the need for more time be anticipated and even then exists in tension with the prohibition against a direct extension.

It also was noted that the Criminal Rules Committee likes the oft-repeated suggestion of one participant that time periods often should be expressed in multiples of 7 days. The advantage would be to reduce the number of occasions on which a period ends on a Saturday, Sunday, or legal holiday.

A choice must be made as to the best method for considering the great many time periods established in the Civil Rules. It may be desirable to provide for consideration by dividing the Committee into two subcommittees, with review in the full Committee. But it may be desirable instead to address the questions initially in the full Committee to facilitate uniform approaches.

Agenda Cleansing

The agenda materials included brief summaries of 33 proposals that have been held on the docket, some of them for several years, without eliciting any sign of interest. Some of them seem worthy ideas that nonetheless are too much points of detail to warrant constant fiddling with the rules. They were presented for discussion on a rule that any member could retain any proposal on the docket for further development at a future meeting. There was brief discussion of two of the proposals.

Uncertainty was expressed as to the nature of the problems that might arise from the 2000 Rule 5(d) amendment that reduces the filing of discovery materials; in 1999 the Standing Committee was concerned that the change might affect evidentiary privileges. There has not been any sign of difficulty since the amendment took effect, and the Reporter of the Evidence Rules Committee sees no reason for concern.

Another of these items suggested amendment of Rule 7.1 to address failure to provide the required disclosure statement. The Rules Office staff conducted a survey of district court clerks in 10 districts, large and small. Nine of the ten said there was no problem. The clerk for the Southern District of Indiana said there is a problem, but not one that merits rule revision. Failure to file a required statement is handled by contacting the parties.

A motion to delete all of these items from the discussion docket passed unanimously.

Rule 8(c)

Apart from the notice pleading question discussed separately, the agenda presents two small questions about Rule 8(c). Each emerged from the Style Project.

One question is whether the designation of "contributory negligence" as an affirmative defense should be revised to reflect the general adoption of comparative negligence in place of contributory negligence. Only a few states continue to cling to contributory negligence. A change, however, would force choice of a new term. Should it be comparative negligence? Comparative fault, because comparison is used with respect to non-negligence claims, as when a manufacturing defect claim of strict liability is met by a defense that the plaintiff was negligent in using the defective product? Or, more accurately still, comparative responsibility because the single numerical allocation of responsibility encompasses both degree of departure from the required standard of care and also relative causal contribution? It was observed that there is no apparent sign of difficulty arising from continued reference to contributory negligence, either because everyone understands it to embrace comparative responsibility or because the extension is automatically made by example through the residuary language of Rule 8(c) encompassing "any other matter constituting an avoidance or affirmative defense." Given the disposition of the larger questions addressed to Rule 8(c), no final determination was made on this question.

The second question was raised by the longstanding suggestion that "discharge in bankruptcy" is no longer an affirmative defense. Judge Walker expanded on this suggestion. Present 11 U.S.C. § 524 carries forward former section 14f, added to the Bankruptcy Act in 1970. Under § 524 a discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any debt discharged in bankruptcy as a personal liability of the debtor, whether or not the discharge is waived. Violation of § 524 is punishable as contempt. It is no longer viewed as an affirmative defense. A default judgment obtained in violation of § 524 is void.

It was agreed that "discharge in bankruptcy" should be deleted from the list of illustrative affirmative defenses in Rule 8(c). There is no pressing problem, as witnessed by the long survival

of this example after it became irrelevant. The change will be made as part of the next convenient package of amendments published for comment.

Discussion beyond those two issues raised the question whether all of the list should be deleted in favor of a simple statement that a defendant should plead any matter that is an affirmative defense under applicable law. That would avoid potential confusions with state law, which may supply different characterizations than the federal rules do. Many of the matters enumerated are likely to arise far more often in state-law cases than in federal-question cases.

It was asked whether it really would be wise to remove the list of examples from Rule 8(c). To be sure, the list is incomplete. And it would be a mistake to attempt to generate a more complete list, in part because of the substantive overtones and in part because the list never will be fully complete. But there is some value in offering common illustrations — although such items as injury by fellow servant may be hopelessly antiquated.

It was concluded that these questions should be carried forward, to be considered as part of any broader exploration of notice pleading that may be undertaken. If there is no broader project, the questions might be considered again independently.

Rule 15

The agenda book presents two pleading topics. One is the question whether the broad general approach of "notice" pleading should be reconsidered. The other is a narrower set of questions addressed to the amendment practice established by Rule 15. Movement away from notice pleading might have a profound impact on amendment practice, but it remains useful to consider possible revisions of Rule 15 within the present notice pleading system. There are compelling reasons to draw back from any general rejection of notice pleading, reasons that in turn ensure that any change will be made only after protracted consideration and debate. A subcommittee considered Rule 15 questions not long ago, and recommended that any study be deferred pending completion of other large projects. Those projects have been completed, and the time is ripe to begin defining the next set of projects. For that matter, one special aspect of Rule 15(c) has come on for substantial attention this year as courts struggle with the need to apply the February 18, 2005 effective date of the Class Action Fairness Act jurisdiction and removal provisions to litigation commenced earlier but subject to later amendments.

Four options are suggested for dealing with these issues: a thorough revision of Rule 15; a very narrow revision of Rule 15(c)(3) to allow relation back not only when there is a mistake but also when there is a lack of information as to the identity of a new defendant; do nothing now, but keep these questions on the docket for future consideration; and purge Rule 15 from the docket.

A somewhat more detailed summary of the Rule 15 materials was provided.

One discrete set of questions arises from the seemingly odd provision in Rule 15(a) that cuts off the right to amend once as a matter of course on the filing of a responsive pleading but not on the filing of a responsive motion. Judges have suggested that this should be changed — among the suggestions submitted to the Committee are that the right to amend as a matter of course should be eliminated, or that it should terminate when a motion to dismiss is filed. Particular irritation is expressed over the experience of encountering an amended complaint filed after submission of a motion to dismiss. Many other revisions are possible, including a revision that would allow amendment as a matter of right within a defined period after a responsive pleading or motion is filed. This generous approach might be defended on the grounds that it remains possible to misplead a valid claim and that leave to amend would almost certainly be granted to any plaintiff who wishes to persist in face of the initial objections.

Other general Rule 15 suggestions have been that Rule 15(b) may be too generous in its approach to amendment at trial; that amendment should be accomplished by filing a complete amended pleading rather than a separate document that must be considered together with earlier pleadings; and that Rule 13(f) might be better integrated with Rule 15.

A different Rule 15 issue has held a place of honor on the agenda for several years. It began with a simple suggestion to amend Rule 15(c)(3). One of the tests for permitting relation back of an amendment changing the party against whom a claim is asserted is that within an appropriate time the new party must have notice so that it knew or should have known that it would have been sued "but for a mistake concerning the identity of the proper party." This language has been tested in many cases in which the plaintiff knew that it could not identify a party that it would make a defendant if identification were possible. Recurring illustrations are provided by actions claiming unlawful police behavior in which the plaintiff cannot name the police officers involved. Several circuits have ruled that in such cases there is no "mistake" and that an amendment naming the proper police officer defendant cannot relate back even though all other (c)(3) requirements are satisfied. It is possible to conjure up reasons to explain this result — the plaintiff who knows of the identity problem should work harder, or file earlier in the limitations period. But these reasons are not compelling. The Third Circuit has rejected them in forceful dictum, and has suggested that the rule should be amended to allow relation back when the new defendant knows it would have been named but for a "mistake or lack of information concerning the identity of the proper party."

Consideration of this seemingly simple proposal initially leads to the question whether other aspects of Rule 15(c) might usefully be considered at the same time. But this way lies madness. As a matter of abstract theory, it is possible to imagine many untoward results arising from the invocation of Rule 4(m) in (c)(3). There is no indication that these possibilities in fact have emerged in practice, but it is fair to wonder whether it is proper to amend the rule even in a small way when it presents manifest opportunities for mischief.

Beyond the drafting problems with present Rule 15(c)(3) lies the central question whether (c)(2) and (c)(3) present genuine Enabling Act questions. (c)(1) provides for relation back when "permitted by the law that provides the statute of limitations applicable to the action." That means that the only occasion for invoking (2) or (3) arises then the applicable limitations law does not permit relation back. These paragraphs operate to defeat a defense established by controlling limitations law. How is this a matter of practice or procedure that does not abridge or modify the defendant's substantive rights and enlarge the plaintiff's substantive rights? There may indeed be cases in which the problem really is one of pleading misadventure, and in which all reasonable limitations policies have been satisfied. The case that prompted the adoption of Rule 15(c)(3), Schiavone v. Fortune, 1986, 477 U.S. 21, may well be such a case. It involved the mistaken designation of the defendant under the name of the division that committed the allegedly wrongful acts rather than under the proper corporate name. The 1991 Committee Note begins by stating that Rule 15 is "revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." But in many cases — and particularly in cases where the plaintiff knows that it cannot identify an intended defendant — the problem is not really a problem of pleading procedure. It is one of limitations policy. Rule 15(c) can be defended as good limitations policy, but is that enough? Is it enough because Courts have accepted relation back under Rule 15(c) since 1966 without hesitating over Enabling Act abstractions?

Discussion began by asking whether law professors tend to think there are serious Enabling Act problems with Rule 15(c). One answer was that "it is problematic." Another answer began with the observation that before 1991 it was possible to argue that then-Rule 15(c) governed relation back

exclusively, prohibiting relation back outside its terms even if state law would permit it. The First Circuit rejected this argument, and properly so. Present (c)(1) is a desirable recognition that federal courts should honor state law that permits relation back. But what of the situation where state law prohibits relation back? It has been accepted for a long time that 15(c) properly permits what state law does not permit. If it is not currently invalid, a small change might not make any difference. At the same time, it can be predicted that any change will encourage some academic doubters to renew the general question of validity. And it is possible that state attorneys general also will challenge it — they have a strong interest in the many civil rights actions challenging acts by state officials.

It was suggested that it would be possible to address the 15(a) questions and then perhaps think about subdivision (c) as a matter of "fairness."

The discussion concluded at this point to defer to the last remaining agenda item, Rule 30(b)(6). It was agreed that Rule 15 would be carried forward for future discussion. It may prove useful to again seek work in a subcommittee before bringing these questions back to the full committee.

Rule 26(a)(2)(B): Employee Expert Witnesses

This topic was brought to the docket by a law review article submitted as a suggestion. Rule 26(a)(2)(B) clearly limits the obligation to disclose an expert witness report to expert trial witnesses who are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve the giving of expert testimony." That means that a report need not be provided for an employee who will testify as an expert witness but whose duties as an employee do not regularly involve the giving of expert testimony. Or so it seems. A majority of the reported cases dealing with this subject take a different approach. They say that disclosure of an expert report is a good thing because it facilitates deposition of the expert, and might at times make it unnecessary to depose the expert. The Committee Note extols the virtues of expert witness reports. In effect, the Committee did not really appreciate what it was doing when it wrote the rule text, so the rule should be read to require a report because an employee who does not regularly give expert testimony is specially retained or employed to give testimony in this case.

These cases fairly pose the question: if the 1993 rule had it right, something might be done to restore the intended meaning. But if the cases are right in believing that a report should be required, finding no worthy distinction based on the regularity with which a particular employee provides expert testimony, something might be done to adopt this revisionist view in the rule text.

Discussion began with the observation that this is a real problem in practice. The conflict in the cases may not be resolved in a particular case until it is too late to do it some other way. A careful response is to give notice to the other side that a particular witness is or is not required to give a report, inviting a response in case of disagreement. There is a particularly serious problem with privilege waiver.

It was noted that in 1997 the ABA Litigation Section offered a report, subsequently withdrawn, complaining that some courts were requiring treating physicians to give expert witness reports under 26(a)(2)(B) even though the Committee Note offers them as a clear illustration of expert witnesses who need not give a report and the cases recognize that a treating physician becomes specially retained or employed only if asked by a lawyer to do something in addition to regular treatment and testimony based on the treatment.

A further question may arise from the relationship to Rule 26(b)(4)(B), which severely limits the right to depose an expert who has been retained or specially employed in anticipation of litigation but who will not be used as a witness at trial.

The problem of privilege waiver is addressed in the Rule 26(b)(2)(B) Committee Note, where it is observed that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Some lawyers continue to fight a rearguard argument that work-product information need not be included in the report even though it was consulted in forming the expert's opinion.

It was asked whether, apart from possible problems of work-product and privilege, there is a good reason not to require a report?

One response was that the 1993 changes in the wording of Rules 26(b)(3) and (4) have introduced uncertainty about the extent of work-product protection for employees. There is a risk that some will be designated as nontestifying "retained" experts to shield against discovery.

A second response was that an employee may be designated as an expert witness under Evidence Rules 702, 703, or 705 because the party is not sure whether the testimony can be admitted as lay opinion testimony under Rule 701. Requiring an "expert" report in these circumstances may be too much.

Beyond opinion, moreover, employee witnesses often will be testifying to blends of historic fact and opinion quite different from the opinions typically provided by a professional expert witness. The universe of information considered by an employee may be far broader than the information provided to a professional expert witness. There may be compelling reasons to enable employee witnesses to talk with the employer's attorneys under shield of privilege. There was a lot of law to that effect before adoption of Rule 26(b)(2)(B).

Privilege was recognized as a problem, but with the suggestion that it tends to be raised early on in the litigation as the parties discuss deadlines for exchanging reports. The careful practitioner, moreover, will ask who has the burden: is it on the party offering a witness to give a report? Or on the other party to depose the witness? If there is no obligation to give a report, a trial-witness expert can be deposed without waiting for the report. Questions asked at deposition may be blocked by an assertion of privilege. Then the privilege question will need to be addressed.

This line was pursued further by asking why it should make any difference to privilege whether a report is required. If privilege and work-product protection should be waived by offering information to a witness for consideration in forming an expert opinion, adoption of an expert-report requirement does nothing more than advance the point at which the otherwise protected information must be revealed. Examination at deposition or trial should be subject to the same waiver principle even though there was no requirement to disclose a report. If the Committee Note to Rule 26(b)(2)(B) got it right, it is not because there is a distinction with respect to privilege waiver between expert trial witnesses who are obliged to give a disclosure report and those who are not. The same holds true for the Evidence Rule 612 provisions on production of documents used by a witness to refresh recollection, provisions that may be invoked at deposition as well as at trial.

This discussion led to the question whether indeed privilege-waiver theories should distinguish between hired experts (and the functional equivalent in employees who regularly give expert testimony) and employees who occasionally are called upon to give expert testimony. There may be an important difference between the need to disclose a 10-page advocacy summary provided

to a hired expert witness and the full range of information available to an employee who may of necessity be involved in helping to prepare the fact information required to try the case. Truly privileged information may deserve protection, being careful to distinguish merely "confidential" information that may deserve a protective order but not the absolute protection of privilege. This distinction may be implicit in the 1993 Committee Note to Rule 26(b)(2)(B), and in turn reflect on the reasons for distinguishing between employees whose duties regularly involve giving expert testimony and other employees sporadically called upon to provide expert testimony.

This thought was expressed more succinctly. The "hired gun" expert witness is a better subject for privilege waiver than the employee who is no more than an occasional trial expert witness. The rule is designed to focus on the independent expert.

A subtle variation was suggested: perhaps privilege should be waived only if the employee actually relied on the privileged information in forming an opinion. If it was merely considered but not relied upon, there would be no waiver.

It was noted that Professor Capra, Evidence Rules Committee Reporter, believes that there is a lot of confusion in this area and that it deserves further work.

Further discussion reiterated concern that several cases seem to disregard what the rule clearly says about reports from employees who do not regularly give expert testimony. It may be better to require reports from all expert trial witnesses, subject to protecting privilege and work-product information. On the other hand, protecting privilege and work product may prove particularly difficult with respect to employees. And it is important that a party know what are the consequences of designating an expert trial witness.

At the end of the discussion it was concluded that the 1993 rule may well have got it right, but that there are very difficult problems of privilege in addition to the question whether it is better to identify a category of employee expert trial witnesses subject to deposition directly without an obligation to first disclose an expert report. The question will be carried forward for discussion at the spring meeting. Among the materials to be considered may be a revision of Rule 26(b)(2)(B) that sharpens the distinction now drawn among categories of employee experts and that provides Committee Note discussion that further explains the problems of privilege and work-product waiver.

Rule 30(b)(6): Organization as Deponent

Professor Marcus introduced Rule 30(b)(6) by noting that it was adopted in 1970 to cure the runaround corporate defendants inflicted on people seeking corporate information. Whoever might be named as deponent would prove unable to provide pertinent information, leading to a practice requiring chains of successive depositions that was called "bandying." Deposition of the organization makes the organization responsible for designating people who will testify for it on the subjects identified in the deposition notice. Even with this procedure, courts still regularly find that corporations have not met the obligation to identify knowledgeable witnesses.

The current questions were initiated by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. They suggest that Rule 30(b)(6) is used in overreaching ways, and in particular is used to intrude on work-product protection. The tensions seem to focus on how much effort is required by the organization deponent to educate individuals in all of the "matters known or reasonably available to the organization." In addition, there are common efforts to argue that an organization's designated witness "binds" the organization by deposition answers. And there are more general concerns that these depositions are used to dig too deep.

It is not clear how far any real problems that may be identified are susceptible of correction by rules changes. The New York Bar proposal would change Rule 30(b)(6) only by limiting the inquiry to "factual" matters; the rest of their suggestions are framed as best-practice guides. It does not seem likely that the Committee will conclude that this rule should be repealed, although other means are available to address the "runaround" problem. It would be possible to address the "admission" problem in rule text; part of the strategy might be to allow changed statements of position but only by supplementing the deposition. The Rule 26(e)(1) duty to supplement an expert witness deposition might be a useful model. The numerical limit questions also can be answered directly — if an organization designates ten persons to appear at its deposition, does that exhaust the presumptive ten-deposition limit? Does each person count as a separate deposition for the limit to one day of seven hours, even though in form this is a single deposition of the organization? If some changes are made in the rule text, finally, it may be appropriate to describe and address the background problems in the Committee Note.

Judge Rosenthal then introduced David Bernick, recently a member of the Standing Committee. He was asked to describe his experience with Rule 30(b)(6) depositions because of his extraordinary range of experience in discovery and actual trial of highly complex cases and because his years on the Standing Committee have assured his understanding of the opportunities and limits of the Enabling Act process.

Mr. Bernick began discussion with a "war story." The witness designated to testify for a corporation about document management procedures did not know about a particular document showing advice by a British lawyer to an affiliated company. The document was the subject of a default sanction in an Australian court in litigation involving an affiliated company, not the corporation that was deponent in the United States proceeding. But the federal court ordered sanctions for failure to provide a witness with knowledge of the document, in face of the argument that to produce a witness with knowledge of the document would necessarily waive privilege. Very complex issues can be involved.

The problems arise from a conflict between substantive corporate law and trial evidence rules. A corporation is a legal construct. Evidence rules focus on reliable, ascertainable facts. Corporate "knowledge" or "action" is derived by inference from the facts of what corporate people do. A judge or jury has to draw inferences, for example, as to what the entity "knew"; it is difficult to reconcile the nature of the party — a legal construct — with evidence rules that do not focus on entities.

Rule 30(b)(6) operates in this context. It operates by creating a über-person whose knowledge is commensurate with what anyone in the organization knows or could reasonably learn. And this testimony binds the organization — the deponent speaks as the organization. And this person can speak for the legal positions of the organization.

The organization deposition serves functions that also can be served by other discovery devices. Rule 33 interrogatories and Rule 36 requests to admit can gather facts. It functions with respect to "ultimate facts" — is the product "safe"? That function can be served by interrogatories, requests to admit, and depositions of persons who have personal knowledge. It also is used to ask for contentions; depositions ordinarily are not used for that, although there may be cases in which the very decision to file the case is a fair subject. Ordinarily interrogatories or requests to admit should be used for contention discovery.

Finally, the unique function of the organization deposition as it has developed is to provide evidence that is dispositive of what the organization can say. Once said by the deponent, the statement becomes the organization's position on the issue. These are treated as "organization facts"

within the organization's custody or control. Rule 33 might at times be used for this purpose, but it is not often used this way. Interrogatories are used in the early stages of the litigation and there is flexibility in answering that forestalls limiting effects. The answers to interrogatories made early in a litigation reserve the right to change or supplement. And if one party asks another party to supplement interrogatory answers, the supplementing can be done by way of incorporating depositions and expert reports — for this reason, supplementation is commonly not requested.

In other settings, depositions rarely provide case-dispositive facts. Requests to admit might be used for this purpose late in the litigation, but it is difficult to frame the requests and the response usually will be a denial. But Rule 30(b)(6) is being used to establish case-dispositive evidence early in the litigation.

The rationale for adopting Rule 30(b)(6) was to solve the runaround problem. It is fair to address that problem. But current usage of the rule goes far beyond that initial purpose. And case law probably will not solve the problem. Nothing in the rule text addresses it. The problem can be solved only by reading into the rule a gloss that does not appear from the language.

Work-product doctrine does not of itself defeat contention discovery; Rules 33 and 36 establish that.

Only an amendment will cure the problem. And amendment should not be difficult. What is needed is a statement of the purpose served by an organization deposition. It is designed for discovery of the "locations of information," so that the vastness of the entity does not hide the information. Use for this purpose early in the litigation is desirable. What does exist, where does it exist, who was it that did the relevant things?

So the rule could authorize a deposition "to ascertain the location of facts discoverable under these rules and within the custody or control of the organization." If for some reason it seems desirable to use these depositions as a uniform vehicle for conducting all discovery of the organization, "location of" could be omitted — "to ascertain the facts discoverable under these rules and within the custody or control of the organization." Discovery would be limited to facts, not contentions, but still could be dispositive as to the facts testified to.

The first question asked after this presentation was why the problem is anything more than a Rule 37 problem focused on an organization's failure to designate someone who has the required corporate knowledge? The answer was that "the consequence is way beyond sanctions." If the witness says "I do not know what testing we did fifty years ago" the deposition statement is used at trial to show that the organization is irresponsible.

Then it was asked why an organization does not address these problems by seeking a protective order? The answer is that present practice is not seen as a misuse of the rule. The problem is the scope of what can properly be asked as the rule is understood. The inquiry can ask more than any person knows. The designated person or persons are required to know everything known anywhere within the organization, and their answers are binding. The Evidence Rules are driven by personal knowledge; a rule 30(b)(6) deponent is required to testify to things that are not personal knowledge.

Beyond that, it is a real burden to have to litigate arguments whether the designated persons failed to do their homework properly. But that burden is less important than the use that is made at trial. If the organization argues that the deposition statement is not right, the opposing party will use the inconsistency — they said one thing, now they say that's not right, when will they get it right?

One Committee member observed that he had obtained a protective order against an adversary's attempt to use a Rule 30(b)(6) deposition to shift the burden of discovery to the organization. Mr. Bernick agreed that the rule should not be used in that way, but noted that many judges disagree. They demand that the organization produce persons with both personal and attributed knowledge. "Undue burden" might be used as a limit, but it has not yet proved a generally effective argument.

It was asked whether courts do permit trial testimony that contradicts things said at the organization deposition — whether the problem is not binding effect, but the admissibility of the conflicting deposition statement? Mr. Bernick responded that some courts do preclude contradiction at trial, and that even if contradiction is permitted the scope of the trial evidence may be limited.

This deposition problem is quite different from the problem that an organization can speak at trial, as at deposition, only through persons. The people who testify at trial will be the right people, the people with the right personal knowledge. And they do not bind the organization on the ultimate issues. The problem, still, is the scope of what the deposition witness is required to speak to — the inquiry is not limited to personal knowledge. For this reason, the requirement that the deposition notice specify the topics for inquiry does not provide effective protection. And if the organization produces witnesses who disagree, they will be asked "what is the organization's position" on the disagreement.

An organization that designates its own trial witnesses thinks long and hard about who they should be. They can be limited to specific topics. They are not required to testify to the ultimate legal conclusion. The pharmaceutical witness will not be asked to address the clinical studies, and so on.

The source of the problem is in large part the obligation to testify to "matters known or reasonably available to the organization." The entity is the deponent. What makes sense is to require it to designate people who learn about where to go to get the information, to identify the witnesses that should be deposed because they have personal knowledge, to identify the documents that should be searched for.

It was asked what should be done when an action is based on long-ago facts that are outside the personal knowledge of any of the organization's people? Mr. Bernick's response was that a rule limited to the location of evidence could include a duty to find who, even including retirees or other no-longer-related people, may have personal knowledge. There is a distinction among people who know of direct experience, people who know only because they are educated specifically for the purpose of discovery, and people who know not of their personal experience but because in the ordinary course of their duties for the organization they learn the relevant information. The problem of Rule 30(b)(6) arises only with respect to those who must be educated for the purpose of discovery, not for other reasons.

So, it was observed, if an employee reads documents solely for the purpose of preparing for an organization deposition, this is "30(b)(6) 'knowledge,'" not real knowledge. The point can be emphasized by asking what happens if the 30(b)(6) witness testifies very effectively. The other side does not use the deposition. If the organization puts the witness on the stand, the witness cannot testify to 30(b)(6) knowledge unless she can be qualified as an "expert" on the subject. But if the other side likes the deposition, it can be used as the deposition of the organization.

It was asked whether, before 1970, the deposition testimony of a person who is an officer, director, or managing agent of an organization "bound" the organization. It was thought that the testimony was binding, but that the deposition of other organization employees did not bind the organization at all. So today, it is possible that an organization may not find anyone other than an

officer, director, or managing agent that is willing to testify at the organization deposition — then it may still be "bound."

A quite different perspective was offered. "[M]atters known or reasonably available" could be read as a restriction on the scope of the deposition and preparation, not a broadening. If the rule were revised, the Committee Note might explain that the location of documents and the identity of fact witnesses are proper subjects; that fifty-year-old information is not; that contentions are not. And an organization should be able to ask for a protective order — for example, to argue that the only purpose of asking about fifty-year-old information is to set the organization up for inappropriate use of the deposition at trial.

It was agreed that an actively interested judge can prevent abuses. But organization deposition problems do not interest many judges. Protective-order motions rarely succeed. The problems will not be solved by hoping that judges will suddenly become interested.

It was observed that some organization lawyers have said that they like 30(b)(6) depositions because they can pick the best deponent. Mr. Bernick responded that you can do this for your trial witnesses. But it is a hassle in major cases. Abuse happens only in a small minority of cases, but when it happens it is a real problem.

And if you produce someone for a 30(b)(6) deposition, you may be ordered to produce the same person for a second deposition.

Mr. Bernick renewed his suggestion that the rule should be amended to direct that the organization's person "must testify about the location of facts discoverable under these rules and within the custody or control of the organization." This is legitimate. It saves a great deal of time. "[L]ocation of facts" for this purpose includes documents and people.

It was suggested in response that it still may be useful to employ 30(b)(6) to dispose of issues easily dealt with. This would not be to seek admissions about matters that are in controversy, but instead to find out what actually is in controversy.

A different suggestion was that the rule would be improved if it still directed the organization to produce a person made knowledgeable about a designated topic, but made it clear that the deposition has no greater effect on the organization than if the same witness had been deposed individually.

Another suggestion was that the rule might be amended to make clear that the scope is a limitation, not an invitation: the deposition "must be limited to matters known or reasonably available to the organization."

The discussion concluded that there is a lot to think about on this topic. It may prove useful to designate a subcommittee to consider these issues. Consultation with the Evidence Rules Committee may be in order. Further work will be done.

Lawyer Signatures on Rule 33, 36 Responses

An ambiguity — or perhaps a conflict — arises from the relationship between Rule 26(g)(2), adopted in 1983, and earlier provisions of Rules 33 and 36. Rule 26(g)(2) says that every discovery response shall be signed by at least one attorney of record, or by an unrepresented party. The Committee Note says explicitly that "[t]he term 'response' includes answers to interrogatories and to requests to admit as well as responses to production requests." There seems no question — an attorney is to sign the answers to interrogatories and also answers to requests to admit.

Rule 33(b)(2), however, says that answers to interrogatories "are to be signed by the person making them, and the objections signed by the attorney making them." The direction that the person making the answers also sign them has appeared in Rule 33 from the beginning. The direction that the attorney sign objections was added in 1970; it is obviously sensible to direct that objections be signed by the attorney, who is more responsible than the party for understanding the reasons that may make an interrogatory objectionable. There is no indication of any intent that the attorney provide a second signature on the answers; that question is posed only by the 1983 adoption of Rule 26(g)(2).

The second paragraph of Rule 36(a) is similar. Each matter of which admission is requested is admitted unless the party addressed by the request serves "a written answer or objection addressed to the matter, signed by the party or by the party's attorney." Here too the language seems to contemplate that the party or the attorney, one or the other, may sign. This provision also dates from 1970, made as part of the decision to delete the former requirement that a party addressed by a request to admit respond by a sworn statement. The Committee Note says, among other things, that Rule 36 admissions function very much as pleadings do, perhaps indicating that an attorney signature suffices.

On the face it, reconciliation seems easy. The later and more specific requirements of Rule 26(g)(2) were clearly intended to require the lawyer for a represented party to sign answers to interrogatories and to requests to admit as discovery "responses." On this view, the only question is whether more specific drafting should be undertaken, perhaps as part of the final stages of the Style Project.

Discussion began with the question why it makes any sense to have both attorney and party sign a discovery response. The lawyer wants the party or its representative to sign the interrogatory answer to impress the obligation of full and truthful answers. It makes sense to have the lawyer sign objections, but why the answers? The signature makes the lawyer vouch for the answers: is that appropriate? It was noted that the Model Rules of Professional Responsibility hold a lawyer responsible if the lawyer knows an answer is false; "if you're responsible, you should sign." But it also was suggested that "an angry judge" does not distinguish between lawyer and party when "an answer is bad" — it makes no difference who signed it. The lawyer is "on the hook" even without signing.

In similar vein, it was suggested that "response" should be taken out of Rule 26(g), leaving Rules 33 and 36 as they are. One problem might be that an opposing party will argue that the lawyer's signature should be admitted in evidence when an interrogatory answer is admitted, putting the lawyer's credibility in issue at trial.

Several members said they had never seen a lawyer sign answers to interrogatories; the lawyer signs the transmittal, but not the answers.

This much discussion suggested that whatever else might be done, the question is too important to be addressed through the Style Project. But that leaves the question whether something should be done to achieve a smoother fit between these rules.

Some members suggested that the topic would be controversial if an amendment is proposed, and that it is better to avoid the controversy unless there is some sign that there are actual difficulties in practice.

But it was suggested that the question may not be so simple. Rule 26(g) was specifically adopted to import standards similar to Rule 11 into discovery practice, and Rule 11(d) was later adopted to make it clear that Rule 11 governs all other matters while Rule 26(g) governs discovery responses. It is important to maintain in the rules a clear sense of attorney responsibility for diligent and truthful answers to all modes of discovery, recognizing that the problems presented by questionable deposition testimony are different. That is what the 1983 Committee Note to Rule 26(g) says.

In the end it was concluded that this topic should be carried forward on the docket without any immediate need for further work. If there is some sign of real difficulties in practice, it can be taken up again.

Rule 48: Jury Polling

It has been suggested that the Civil Rules should include a provision on jury polling. A model is ready to hand in Criminal Rule 31(d). This model allows the court to poll the jury on its own, and requires a poll if it is requested by any party. Polling both ensures that the verdict is indeed the verdict of all jurors, and may reveal problems while there still is an opportunity to solve them without need for a new trial.

The Federal Judicial Center was asked to gather figures on the frequency of hung juries as an indication of the possible risk that routine polling might result in frequent new trials. A study of more than 100,000 jury trials over a period of 25 years from 1980 through 2004 showed that fewer than 1% of civil jury trials result in a hung jury. This information suggests that there is not likely to be much of a problem in this direction.

Committee members expressed the view that this is a good suggestion, with no significant disadvantage.

One possible problem was noted with the language of Criminal Rule 31(d), which calls on the court to poll the jurors "individually." It has been argued on a recent appeal, not yet decided, that "individual" polling requires that the court poll each juror separately in chambers, apart from the other jurors. Resolution of the appeal will indicate whether there is indeed a problem, or whether there is convenient authority to cite to show there is no problem.

It was asked whether it would be better in Civil Rule 48 to use the same expression as in Civil Rule 49, offering as one option a "new trial" rather than "declare a mistrial and discharge the jury." The reference to mistrial in the Criminal Rule may reflect the sensitivity that surrounds double-jeopardy interests: a new trial may not always be available after a mistrial. But it was suggested that since the Civil Rule will address a problem addressed by a parallel Criminal Rule, it is better to adopt exactly the same expression unless there is some more persuasive reason for departure.

This topic will be the subject of a proposal to publish a rule at the spring meeting.

Rules 54(d)(2), 58(c)(2), Appellate Rule 4

The Appellate Rules Committee, in response to questions explored in Wikol v. Birmingham Public Schools Bd. of Educ., 6th Cir.2004, 360 F.3d 604, has suggested that Civil Rule 58(c)(2) be amended to impose a deadline for exercising the trial court's authority to order that a motion for attorney fees suspend the time to appeal the judgment on the merits. The Sixth Circuit opinion, and the exchanges between the Civil Rules and Appellate Rules Reporters, clearly demonstrate the complexity of the interrelated rules provisions that must be navigated to understand present procedure. They also reveal a potential flaw in the language of Rule 58(c)(2) that could, in unsympathetic or maladroit hands, lead to a foolish result enabling the trial court to extend appeal time long after it has concluded.

If that abstract description seems to call for a rule amendment, however, it may be met by countervailing concerns. The core complexity of Appellate Rule 4 has withstood many rounds of revision. Given the rule that appeal time limits are mandatory and jurisdictional, appeals will continue to be lost for missteps in reading or understanding. The rule has been made complex to respond to competing pressures — there is a strong desire to force prompt decisions whether to appeal after the trial court has concluded its actions in the case, but also a strong desire to support orderly resolution by the trial court of post-trial motions that should be decided by the trial court and ordinarily should be decided before there is any appeal. The complexity of the rules that seek to integrate fee motions with appeal time is no different.

The appeal-time issues are framed by the "bright-line" rule that an otherwise final judgment remains final even when there is a pending motion for attorney fees. That means, if there were no contrary rules provisions, that any appeal must be taken in the time allowed without regard to action on the fee motion. This consequence in turn means either that there must be two appeals, one on the merits and the other on the fee motion, or else that the right to appeal on the merits is lost if not timely exercised before disposition of the fee motion. In many cases it may be desirable to tend to the appeal on the merits before the fee issue comes on for decision in the trial court. But in other cases it may be desirable to arrange for disposition of all issues, merits and fees, in a single appeal.

Rule 58(c)(2) responds to these competing interests by establishing trial court discretion to order that a timely motion for attorney fees under Rule 54(d)(2) suspends the time for appealing on the merits. This is accomplished by cumbersome language that invokes both Civil Rule 59 and Appellate Rule 4: "the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." According to Appellate Rule 4(a)(4)(A)(iv) and (v) timely Rule 59 motions end the running of appeal time; a new appeal period starts to run on entry of the order disposing of the last remaining motion among those enumerated in 4(a)(4)(A).

This explicit invocation of one part of Appellate Rule 4 is made more complicated by the implicit invocation of other parts of Rule 4 arising from the Rule 58(c)(2) reference to a notice of appeal that "has been filed and has become effective." These words incorporate separate parts of Rule 4. One is Rule 4(a)(2), which directs that a notice of appeal filed after a decision is announced but before entry of judgment "is treated as filed on the date of and after the entry." Although filed, the premature notice is not yet "effective." In itself this provision does not create much complication. But the premature notice, and also a notice filed after entry of judgment, take effect only provisionally; the effect is ended by the filing of a timely motion of the sort that suspends appeal time under 4(a)(4). Those notices "take effect" within the meaning of Rule 58(c)(2) only on disposition of the last of the motions designated in 4(a)(4).

The upshot of all of this is that the trial court is given authority to make a nuanced ruling on appeal timing, similar in some ways to the Civil Rule 54(b) discretionary authority to enter final judgment on disposing of one or more claims, or all claims among two or more parties, before complete disposition of an entire case. If it seems useful to let an appeal on the merits proceed while the attorney-fee motion remains to be decided, the trial court need do nothing. If it seems useful to postpone the appeal on the merits while the attorney-fee motion is decided, the trial court can act to suspend appeal time until the moment when a notice of appeal has "become effective." If there is a timely post-trial motion within the Appellate Rule 4(a)(4) categories, the trial court can consider this matter up to the time it disposes of the last such motion.

So, given this carefully crafted structure, what is wrong — apart from the need to figure it all out? A brief description of the Wikol case illustrates a possible shortcoming in Rule 58(c)(2) as adopted. The time line was this:

(1) March 22: the plaintiffs, having won a jury verdict, move for attorney fees.
(2) March 27: judgment on the merits entered.
(3) May 15: fee motion denied.
(4) May 24: plaintiffs move for a 58(c)(2) order.
(5) June 14: plaintiffs file a notice of appeal.
(6) July 11: Rule 58(c)(2) order extending appeal time. entered.

The court concluded that the June 14 notice was effective to appeal denial of the fee motion because it was filed within the appeal period measured from May 15. Because it was effective in part, it cut off the authority to extend appeal time, even though it was not effective as to the merits because untimely as measured from entry of judgment on March 27. The July 11 order was not effective. The court was concerned, however, that it had been required to work through several interrelated rules to reach this result, and invited the advisory committees to consider possible simplifications or clarifications.

The circumstances of the Wikol case illustrate the ways in which parties may run afoul of these rules. They also illustrate a bizarre possibility. Suppose the plaintiffs had not filed a notice of appeal on June 14. The Rule 58(c)(2) order entered on July 11 might then be found effective, because the court would have acted before a notice of appeal had been filed and become effective. Never mind that at that point no notice of appeal could become effective absent a Rule 58(c)(2) order. This reading would establish discretionary authority to revive expired appeal time long after the opposing parties had thought the case concluded. Presumably trial courts would seldom grant such orders, but any such order would run contrary to the general purposes and character of Appellate Rule 4.

What might be done to address this possible problem?

The agenda materials sketched two approaches, neither of them entirely satisfactory. One is a partial response to the Appellate Rules Committee's suggestion that Rule 58(c)(2) include a deadline by which the trial court must exercise the authority to extend appeal time. This version allows an extension only if the court gives notice or a party moves within 14 days after a timely attorney-fee motion is made. That would establish a clear cut-off for raising the question, well short of the present rule that allows the court to act at any time before disposing of the last timely motion made under Rules 50, 52, or 59 (or a Rule 60 motion that would be timely as a Rule 59 motion). At the same time, it would not force the court to act immediately, and without more does not establish a point that cuts off the time to act so long as the question was raised at the required time. It has the virtue of eliminating the bewilderment an uninitiate practitioner might encounter in reaching a confident understanding of what it means to act "before a notice of appeal has been filed and has become effective." An alternative version would substitute the limit that the court may act before

a timely notice of appeal has been filed and become effective. This version would directly defeat the possible argument that the present rule allows a court to extend appeal time on the basis of a notice that, because not timely, could never become effective. But it would not alleviate the complexity of the present rules, and might somehow manage to aggravate the complexity.

Quite different approaches are possible. One would be to rescind Rule 58(c)(2) and the parallel provision in Appellate Rule 4. The result would be that the time to appeal judgment on the merits always runs uninterrupted from the entry of judgment. The appeal from disposition of the fee motion must be taken separately. Consolidation of both appeals may be possible, but that will depend on the progress of the case in the trial court and in the court of appeals. The opposite approach would be to rescind Rule 58(c)(2) and amend Appellate Rule 4 to provide that a timely motion for attorney fees always suspends the time to appeal judgment on the merits. If indeed some cases benefit from having the merits appeal resolved before the fee motion is decided, this approach would defeat that benefit (unless the Appellate Rules were amended to allow the notice of appeal on the merits to become effective before disposition of a timely fee motion, an additional complexity that few are likely to wish).

Discussion began with the suggestion that it would be useful to know how courts now exercise the Rule 58(c)(2) authority to adjust appeal timing. Do courts routinely direct that appeal time be suspended? Routinely refuse to suspend appeal time? Mix the effects of their orders because it has proved desirable to adjust according to the understood different needs of different cases?

The desire for additional data was lauded as a good idea. One practicing lawyer commented that in all the cases he had encountered where the parties disagree about postponing appeal on the merits the judge has allowed the petition and failed to suspend appeal time. It was agreed that there is "a lot of confusion in the bar," and that information about the use made of Rule 58(c)(2) would be a good starting point. There are clear tensions pitting the desire to avoid piecemeal appeals against the fear that appeal on the merits should not be long delayed.

It may be desirable to move forward with this project because it ties directly to the time project. The Federal Judicial Center will be asked whether it is possible to undertake a study that will provide better information about the ways in which Rule 58(c)(2) is now used. In any event, the questions should remain on the agenda for active pursuit.

Rule 60 or 62.1: "Indicative Rulings"

Several years ago the Solicitor General suggested that the Appellate Rules Committee adopt a rule addressing the relationships between district courts and courts of appeals when a party seeks relief from an order that is the subject of a pending appeal. The Appellate Rules Committee considered the proposal and — without making any recommendation whether a rule should be adopted — concluded that the matter is better considered within the framework of the Civil Rules.

Most of the attention has focused on motions to vacate a judgment under Civil Rule 60. The pendency of an appeal does not toll the time for seeking Rule 60 relief. The motion must be made within a reasonable time, subject to a maximum limit of one year for motions made under the most frequently invoked paragraphs, Rule 60(b)(1), (2), and (3). The motion, moreover, must be made in the district court. The district court is in a far better position to evaluate the grounds for relief. The district court, however, lacks power to grant a motion addressed to a judgment that is pending on appeal; this area of practice, as many others, is governed by the longstanding rule that only one court should have control. A clear practice to address the resulting dilemma has been adopted in most circuits. The district court has authority to consider the motion. It has authority to deny the motion. But the district court lacks authority to grant the motion. If it believes that relief should be

granted it can "indicate" that it would grant relief if the case were remanded for further proceedings. (Variations also appear. The Ninth Circuit practice denies district-court authority to deny the motion — the district court can consider the motion and can indicate what it would do if the case were remanded, whether to grant or deny. The Second Circuit apparently dismisses the appeal without prejudice to reinstatement after the district court acts on the motion.)

There may be sound reasons to adopt a rule that governs this "indicative ruling" procedure. Even though practice is well established in most circuits, many lawyers and some judges are not aware of it. An explicit rule provision could avoid many false starts and some mistakes. A rule also would establish a uniform national practice for all courts. Beyond that, a rule might helpfully address some details of practice. The agenda drafts, for example, require the moving party to notify the court of appeals when the motion is made and again when the district court has decided what it would do. Notice would enable the court of appeals to regulate its own proceedings in relation to the district court, and to decide promptly whether to remand if the district court indicates that a remand is desirable.

The agenda drafts raise other questions, some small and some not so small. They would allow a district court to indicate that remand is desirable not to grant relief but to justify a considerable investment of energy needed to determine whether to grant relief. They address the question whether the indicative ruling procedure should be triggered by filing a notice of appeal or instead should follow the model of present Rule 60(a) that allows district-court action until the appeal is docketed in the court of appeals. These are small questions.

A much larger question is whether a rule defining an indicative ruling procedure should be limited to Rule 60. The Solicitor General's proposal encompassed other situations in which a pending appeal defeats district-court authority to grant relief. It may be that a general approach would be more suitable in the Appellate Rules than in the Civil Rules because of the broad range of circumstances that may be presented by appeals taken before a truly final judgment. Or it may be that the topic is simply too broad to approach in any rule. Quite different questions arise in the many different settings that permit interlocutory appeals. It seems to be accepted that a district court generally may not act on the very order that is pending on appeal without permission from the court of appeals. The authority to modify a preliminary injunction that is the subject of a pending appeal, for example, is sharply limited. But district courts retain authority to manage many other parts of the litigation. Section 1292(b) and Civil Rule 23(f), for example, expressly address the question whether proceedings should be stayed. Section 1292(a), on the other hand, does not. It is recognized that the district court can continue to manage the case while an appeal is taken from its action on an interlocutory injunction request, including authority to decide the action on the merits. And appeals taken under the collateral-order expansion of "final decision" appeal jurisdiction are left completely adrift. Some courts, for example, have adopted a rule for official-immunity appeals analogous to the approach taken to double-jeopardy appeals in criminal cases: the purpose of the appeal is to protect against the burdens of further trial-court proceedings, so ordinarily all proceedings should be suspended, but the district court can press ahead on "certifying" that the appeal is frivolous. Other collateral-order appeals, however, generally should not interfere with continued trial-court proceedings.

If a general rule is to be adopted, it is likely better to craft a new rule rather than attempt to address all of these questions within the limits of Rule 60. The difficulty of framing a new rule is illustrated by the sketch of a Rule "62.1" in the agenda materials. A first question is whether to define the rule in terms of acting on a "judgment" on the theory that any order that can be appealed is defined as a judgment by Rule 54(a). This focus might help to avoid unintended consequences of referring to an "order," but it invites the uncertainties that grow out of Rule 54(a). A second and

more important question is how to define the circumstances that require resort to an indicative ruling procedure. The draft refers to an order "that is pending on appeal and that cannot be altered, amended, or vacated without permission of the appellate court." The drafting seems awkward. It might be better to begin the rule by focusing on the need for appellate permission: "If the appellate court's permission is necessary to authorize the district court to grant a[n otherwise timely] motion [under these rules] to alter, amend, or vacate a judgment, the district court may consider the motion and * * *."

Discussion began with an expression of uncertainty as to the means of addressing motions apart from Rule 60 motions. Should the subject of the motion indeed be characterized as a "judgment," or will that misdirect practice when the appeal is from an order that few would recognize is made a judgment solely by operation of Rule 54(a) — and then is a "judgment" only if in fact it is appealable? The Third Circuit, for example, has a broad approach to permitting collateral-order appeal from an order that denies a claim that privilege defeats discovery. Who would think of the discovery order as a "judgment"?

It was noted that the Tenth Circuit practice is to remand in response to an indicative ruling only if the district judge indicates that relief will be granted on remand. A remand to support further exploration before deciding whether to grant relief is not available.

Enthusiasm was expressed for pursuing this project. It would have practical utility, reducing the remaining variations in practice. It helps to "codify what the market has done." The practice, further, has an additional virtue that has not been noted in the discussion. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 1994, 513 U.S. 18, the Supreme Court ruled that parties lack power to settle on appeal on terms that require that the district-court judgment be vacated. "[M]ootness by reason of settlement does not justify vacatur of a judgment under review." Although exceptional circumstances may justify vacatur, mere party agreement to vacate is not of itself an exceptional circumstance. But the Court also noted that even absent extraordinary circumstances, a court of appeals "may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." Parties fearful of the precedential impact of the district-court opinion, and uncertain as to possible nonmutual preclusion effects, may be able to settle only if they are confident that the district-court judgment will be vacated. Settlements may be advanced by adding to the rules an explicit provision for this course.

It was noted that class actions present a special variation on the question of settlement pending appeal. Remand is necessary since district-court approval of the settlement is required under Rule 23(e).

Some reluctance was expressed by observing that an indicative ruling procedure "looks like a glorified motion to reconsider" that should not be encouraged by an express rule. Recognizing that an indicative ruling procedure will make more work for district courts, it was urged that the district court nonetheless is in the best position to consider the issues and in any event is required to do so under present procedure so long as the court is aware of it.

It was concluded that this topic should remain on the agenda, to be pursued at the spring meeting on the basis of drafts that develop both a Rule 60-only provision and also a more general provision.

Summary Judgment — Rule 56

Judge Rosenthal introduced the discussion of summary judgment by noting that there are well-known problems with the language of Rule 56. The problems proved frustrating in the Style Project. Every struggle with the language revealed ambiguities and flaws. Present Rule 56 does not describe what parties and courts do in pursuing summary judgment.

The timing provisions are clearly inadequate and divorced from the practice. Everyone ignores them. "Partial summary judgment" is a well-known practice, but it is not mentioned in the rule. There may be many other opportunities for improvement, whether to make the rule express what happens in practice or to alleviate problems it causes in practice.

The Time Project will require consideration of the time periods in Rule 56. That may be an added incentive to take on other parts of the rule as well. But the project will be very difficult.

The Reporter provided an introduction summarizing half a dozen of the more important questions raised by the failed 1991 proposals to revise Rule 56. The description was assisted by distribution of the 1991 rule text and Committee Note.

The first question is raised by the first paragraph of the 1991 Committee Note. The purpose of the revision appears to have been to encourage greater use of summary judgment — "to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that * * * can have but one outcome." The Note, however, also continues with a cautionary note: "while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters." This caution suggests a different possible purpose — to rein in unwarranted overuse of summary judgment. A third possible purpose might be to combine the first two, reflecting a determination that the actual implementation of summary-judgment procedures varies among different courts and that it would be good to encourage greater use by reluctant courts while discouraging overuse by over-eager courts.

A second question would address the standard for granting summary judgment. Long before the 1991 amendment of Rule 50, the standard for summary judgment called for a determination whether the moving party was entitled to judgment as a matter of law. The 1991 Rule 50 amendments discarded the traditional references to directed verdicts and judgments notwithstanding the verdict in favor of judgment as a matter of law and renewed motions for judgment as a matter of law. The change of vocabulary was intended to emphasize the continuity of a single standard for measuring the sufficiency of the evidence. The same standard applies whether the eventual trial would be to a jury or to the court. The 1991 version of Rule 56 discarded the familiar "genuine issue of material fact" language in favor of determining whether summary adjudication is warranted "because of facts not genuinely in dispute," so that "a party would be entitled at trial to a favorable judgment or determination * * * as a matter of law under Rule 50." Some such approach might make more clear than the rule now does that the directed verdict standard controls. It would be possible to go further in at least two directions. One would be to emphasize the efficiency advantages of summary judgment to argue that summary judgment might be governed by a standard less demanding than the directed verdict standard at trial. A closely related change would be to adopt a less demanding standard for cases to be tried without a jury. But neither of those changes seems likely to deserve serious consideration. Obvious Seventh Amendment concerns would arise from any attempt to defeat the right to jury trial on a fact record that — if duplicated at trial — would require submission to the jury. And even for bench trials, it seems better to require the judge to hear live witnesses if any party is unwilling to submit to trial on a paper record; it might prove too tempting to allow avoidance of trial on a lesser standard than applies in jury cases.

A third question is whether Rule 56 should be rewritten to express the practices established by the decisions in *Celotex Corp. v. Catrett*, 1986, 477 U.S. 317, and *Anderson v. Liberty Lobby, Inc.*, 1986, 477 U.S. 242. The *Celotex* decision defined the summary-judgment burden for a movant who would not have the burden of production at trial. The movant can carry the burden in either of two ways — it can undertake to disprove an essential element of the nonmoving party's case, or it can "show" by reference to affidavits and discovery materials that the nonmoving party cannot produce evidence sufficient to carry the trial burden. The *Liberty Lobby* decision ruled that when the standard of persuasion requires clear and convincing evidence the directed-verdict standard — and by reflection the summary-judgment standard — requires more proof to defeat judgment as a matter of law than when the standard requires only a preponderance of the evidence. The 1991 draft sought to incorporate both rulings by providing that "A fact is not genuinely in dispute * * * if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50." This draft illustrates the challenge that any draft must face: it is intelligible to someone who understands the *Celotex* and *Liberty Lobby* decisions, but must prove challenging to anyone who does not. It also illustrates the question whether at least the *Celotex* decision should be enshrined in the rule. The lore of 1991 is that the Rule 56 proposal was rejected on two divergent responses to the proposition that it expressed current practice. One response was that there is no need to amend a rule simply to reflect what everyone understands in any event. The other response was that it is undesirable to amend a rule to freeze undesirable current practices. It would be possible to remain faithful to the directed-verdict analogy, and in some ways to perfect it, while rejecting the *Celotex* decision. At trial the party with the burden of production loses unless it produces sufficient evidence to carry the burden. The same approach could be taken on summary judgment — a party who does not have the trial burden of production is entitled to summary judgment on request unless the nonmoving party comes forward with sufficient evidence to carry the trial burden. Or, perhaps more plausibly, it could be argued that the *Celotex* approach makes it too easy to win summary judgment. Before 1986, many courts and lawyers had believed that a party who does not have the trial burden of production could win summary judgment only by offering evidence to negate the nonmoving party's case. That approach could be restored.

A fourth question reflects on the imminent need to reconsider Rule 56's timing provisions in conjunction with the time-computing project. Rather than adopt time limits expressed in days, the 1991 draft allowed a motion to be made "at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control." A functional approach such as this has an obvious charm, but it might generate numerous disputes over what is a "reasonable opportunity" in a way that application of present Rule 56(f) does not so much encourage. It also seems to foreclose consideration of a procedure that would enable a motion for summary judgment — perhaps under a different name — to be filed with the complaint in actions to collect a "sum certain." Federal courts regularly encounter actions to recover overpayments of government benefits or defaulted government loans, and also encounter similar private actions. Modern summary judgment has roots in summary collection procedures that might well be restored by crafting a special timing provision in Rule 56.

A fifth set of questions has held a place on the agenda since a time only a few years after rejection of the 1991 attempt. Many districts have local rules that establish detailed requirements for summary-judgment practice. The common thread is a requirement that the moving party specify the facts that appear beyond genuine issue and point to materials on file that support its position. The nonmoving party must state whether it accepts any of the asserted facts, identify other facts as to which it asserts a genuine issue, and likewise support its positions by pointing to specific record

materials. Such widespread elaboration of Rule 56 suggests that it may be useful to synthesize a uniform procedure from the best developed local procedures.

A sixth major set of issues relates to the fifth. In two different places the 1991 draft seemed to authorize summary judgment for default of response by the nonmoving party. The provision requiring a nonmoving party to respond by citing record support for its position concluded by providing that failure to timely comply "in challenging an asserted fact" "may be treated as having admitted that fact," draft Rule 56(c)(2). And draft 56(e) on "matters to be considered" provided that "the court is required to consider only those evidentiary materials called to its attention" by the moving and nonmoving parties. This provision spares the court any obligation to search the record for relevant information omitted by the parties' submissions. But, as compared to the "may be treated as having admitted" provision, it may imply that the court is required to consider the matters pointed to by the moving party. This possible internal tension reflects a tension in reported cases. At least some circuits have clearly ruled that a court cannot grant a motion for want of response without examining the materials submitted by the movant to determine whether the movant has carried the summary-judgment burden. This question goes to the core of what summary-judgment practice should be. As compared to failure to answer a claim, it may be argued that summary judgment is a shortcut that cannot be taken to defeat a right to trial without examining the moving party's showing. There is an analogy to failure to appear for trial — a defendant who has answered, denying the allegations, may (at least in some courts) be entitled to a requirement that the plaintiff put on a case. Even apart from that analogy, summary judgment may be disfavored as an expedient that should defeat the right to trial only if the court accepts the responsibility of examining the summary-judgment showing.

Discussion began with the observation that there is a large body of learning on summary judgment. Many are skeptical of change. They argue that change will put a thumb on the scale, to make it either easier or more difficult to win summary judgment. But that seems wrong. It should be possible to reform the procedure of summary judgment without changing the standards.

The next two voices differed. The first thought the project of revising Rule 56 an excellent idea. The second thought the project should not be attempted. In a practical sense, there are no problems. The problem with the timing provisions is met by routine extensions. The practicing bar has a good grasp of current practice. Even if a motion is unopposed, trial judges review the supporting materials to determine whether the motion should be granted.

As to the timing provisions, it was noted that they must in any event be considered as part of the time-counting project.

A third view, from a practicing lawyer's perspective, was that "the rule is a wreck." It is unusual that the text of a rule that plays so dominant a role in the administration of cases is so far divorced from practice. The rule is very important. Practice in federal courts, moreover, is increasingly national; it would help national practitioners to have a uniform approach expressed in the national rule. The project is worth taking on.

Further support came with the observation that this is a good project, but it should be divided into separate parts. One part is the procedure of Rule 56. Here there is room for some reservations about the level of detail reflected in the draft Rule 56(c) that spells out the detailed obligations of moving and responding parties. A more fundamental question is whether the rule text should attempt to reflect the *Celotex* and *Liberty Lobby* rules.

Similar comments further supported some form of Rule 56 revision. The local rules are an important help for practitioners — those who look only to Rule 56 do the job poorly. If indeed there is a substantial gap between the rule text and actual practice, so that those who are experienced in

local lore have an advantage over the inexperienced, the project is worthwhile even though it will be challenging. Rule 56 is a trap for the unwary; practitioners accustomed to state practice in Texas, for example, may fail to oppose a summary-judgment motion in federal court because they expect there will be a live hearing. The proliferation of local rules shows there is a need to consider the procedures that surround summary judgment; it may be better to avoid the standards that control the decision.

A different thought was expressed by observing that summary-judgment procedure imposes costs that may drive out smaller claims. A claim for less than perhaps $100,000 may not be sufficient to sustain the costs both of opposing summary judgment and also of actually trying the case. Perhaps there should be a simplified practice for some types of cases that omits summary judgment. At the same time, another participant recalled the suggestion that perhaps summary disposition is particularly useful in some categories of low-dollar cases, especially simple collection cases. At the same time, the question of simplified procedure has never disappeared from the agenda; development of any simplified system will include consideration of the proper role of summary procedures.

It was suggested that it would be a useful preliminary project to compile a set of local rules to illuminate the approaches that might be taken and to facilitate development of a uniform procedure that will be familiar to many courts and lawyers. It also would be useful to gather at least a few standing orders from districts that do not have local rules.

Yet another member suggested that developing a national rule that conforms to practice in procedural matters is a worthy goal, while it may be better to avoid attempts to define summary-judgment standards.

Another brief statement about standards was that reasonably uniform pronouncements may mask substantial differences in application. Many lawyers and judges believe that some courts are more receptive to summary judgments than are other courts. The Fifth Circuit, for example, seems receptive.

It was noted that Joe Cecil at the Federal Judicial Center has collected a lot of empirical data on the working of summary judgment and is working on it. This work may be useful in determining whether there is any reason to pursue the standards question.

A particular issue of standards was noted. Many courts have ruled that a trial judge may refuse to allow an interested person to defeat summary judgment by submitting a "self-serving, self-contradicting" affidavit that seeks to retract damaging testimony at an earlier deposition. The underlying purpose is clear. It would be all too easy to defeat the purposes of summary judgment if a party need do no more than this. But the conceptual foundation for the practice is shaky. A party may, at trial, avert judgment as a matter of law by retracting unfavorable trial testimony. If summary judgment is controlled by directed-verdict standards, it is difficult to understand why a similar practice should not apply. To be sure, the district court has discretion to accept the affidavit and deny summary judgment; the most common formulation seeks a plausible explanation for the changed testimony. This approach might be refined into a rule that a self-serving affidavit need not be accepted to defeat summary judgment because an affidavit is too far removed from the nature of testimony in open court, while retraction at a new deposition following proper notice will defeat summary judgment because the moving party has a better opportunity to test the retraction. But there was no apparent interest in attempting to transform any such approach into Rule 56 text.

The theme of discretion was noted from the more general proposition that, unlike judgment as a matter of law at or after trial, a district judge has discretion to deny summary judgment even though a verdict would have to be directed if the trial produced the same record as is presented on

summary judgment. This practice is supported by a variety of concerns. The most obvious is the prospect that even though no sufficient Rule 56(f) showing of a need for further discovery can be made, a better record may emerge at trial. In related fashion, it may prove more efficient simply to try the case than to agonize over the often diffuse summary-judgment record. And it is proper to seek the reassurance of an actual trial record when a case presents issues of general public importance or a need to develop the law in light of the inspiration provided by a sure grasp of particular facts.

These comments renewed the question whether it is appropriate to define a project that seeks to clarify and improve the procedures that govern summary judgment without attempting to express Rule 56 standards in new language. Any form of Rule 56 project will be "interesting" in the senses of importance, difficulty, and potential controversy. But, this comment suggested, it remains worthwhile.

The bar groups that suggest many procedure reforms have not sought Rule 56 amendments. But no one has asked for advice, and committee members believe that the American College of Trial Lawyers would be interested.

Reluctance was expressed with the thought that any Rule 56 project, however defined, will "elicit neurotic responses from the bar." All of the sensitive issues will be raised despite careful efforts to address only more narrowly "procedural" problems. Any project must be long-term. Absent any emergent concern in the bar, it may not be worth it.

Discussion turned to Rule 56(f) with the observation that this part of the practice is very important. What is so important is that Rule 56(f) orders become the focus of regulating and narrowing further discovery. It may be desirable to consider changes here. This suggestion was echoed with agreement that the practice is very important, yet many lawyers do not seem to be aware of it while those who are aware do not know how to use it well. One of the suggestions made with the 1991 draft was that it would be useful to regularize an "offer of proof" procedure that requires a party to justify the need for further discovery by describing the facts it hopes to support by admissible evidence and — if possible — by pointing to inadmissible information that supports the hope that admissible evidence can be found.

Rule 56(d) also was noted with the thought that it is little used, but perhaps should be encouraged because taking issues off the table by "partial summary judgment" can simplify the remaining litigation and make it more affordable. The 1991 draft seemed to encourage this, in part by splitting a general concept of "summary adjudication" into separate categories of "summary judgment" disposing of a claim and "summary determination" that resolves important issues or defenses.

The conclusion was that the next step will be to gather local rules and a few illustrative standing orders. The Federal Judicial Center will be asked to lend such support as it can within the many competing demands on its resources. The spring meeting will afford an opportunity to decide how to go forward "without sinking into a morass of substantive issues."

Rule 8: Notice Pleading

Judge Rosenthal introduced the notice-pleading topic as one of the fundamental long-range characteristics of the Civil Rules that merits periodic evaluation to determine how well the present system serves the goals articulated in Rule 1. Do we continue to have the best approach toward accomplishing the just, speedy, and inexpensive determination of litigation? A few years ago the Committee took up the question whether simplified procedures might be adopted to address cost and delay for at least some subset of civil actions. After finding the questions difficult the Committee

postponed further action on that project. It is appropriate to ask whether the project might be taken up again, or whether it might be transformed into a general investigation of systems that might elevate the role of pleading and, by diminishing the role of discovery, reduce cost and delay. The 1938 rules focused on individual litigation in a setting that provided a very different mix of cases than we know now. Changes in the nature of litigation may justify reexamination of the basic system. At the same time, it must be recognized that notice pleading is a sensitive topic. To take on the topic is to invite charges that the purpose is to raise barriers, to limit access to court for disfavored types of litigation. That is not the purpose. But the topic is one to be approached with great care, if at all.

Discussion of notice pleading must always begin with recognition of the great changes made by the Civil Rules in 1938. Notice pleading and discovery were combined into a new package that heavily discounted the possible value of pleading as a device to screen unfounded claims or to help prepare for trial. Pleading instead was designed to set the stage for other pretrial devices that would bear the primary responsibility for exchanging fact information and contentions between the parties. Discovery has expanded enormously since 1938, and has been supplemented by the prediscovery Rule 26(f) conference, disclosure, and proliferating uses of Rule 16 pretrial practice. The result has been to transform the real meaning of established legal principles and also — in reaction to facts disclosed by discovery that often would never have emerged in any other fashion — to accelerate the development of new legal principles. Rule 11(b)(3) reflects the interdependence of pleading with discovery and the continually increasing reliance on discovery: it is proper to advance fact contentions without evidentiary support so long as the allegation is "likely to have evidentiary support after a reasonable opportunity for further investigation and discovery." Civil litigation is a far more powerful instrument of social regulation than it would have been under earlier pleading and discovery systems.

These changes have not come free. The Committee has struggled with calls to control the burdens of discovery almost continually since the 1970 amendments that broadened the scope of discovery. Discovery questions continue to press, not only in the relatively confined topics addressed at this meeting but also in pervasively difficult and ever-changing subjects such as discovery of electronically stored information. It is possible to reconsider the decision that the procedural system should support and even encourage litigation based on the hope that discovery will produce support for contentions hoped for but not capable of support at the time of the complaint. More rigorous pleading standards could be imposed, at least in some cases.

The nature of any inquiry into notice pleading must be tempered by asking what notice pleading means in actual practice. The Supreme Court has twice ruled clearly that "heightened pleading" can be required only when specifically provided by statute or by a Civil Rule, such as the Rule 9(b) provision for pleading fraud or mistake. Those opinions also suggest that any change should be made in the orderly course of the Rules Enabling Act process. But other Supreme Court decisions contemporary with these decisions seem to approve heightened pleading requirements. And the lower federal courts, although directed in part by the statements that heightened pleading can be required only under a specific rule or statute, continue at times to demand pleading details that go beyond mere notice of the events that give rise to the plaintiff's demand for relief. These practices, persisting over many years in the face of explicit discouraging words, suggest that bare minimum notice pleading may not be the best answer for all cases. It may be appropriate to ask greater detail in some cases.

One obvious approach would be to develop specific pleading rules for specific types of claims, building on the models provided by Civil Rule 9 and by the Private Securities Litigation Reform Act. This approach, however, has manifest substantive overtones and might augment

concerns that heightened pleading requirements spring from distaste for some varieties of legal rights. It also might prove too confining, imposing demanding standards across entire categories of cases that include many actions that should not be subjected to heightened pleading.

Another approach would be to move back toward fact pleading as a general requirement. The original idea of "Code" pleading may not have been a bad idea; it may have been the implementation by lawyers and judges caught up in the spirit of petty legalism that led to the practices rejected by the move to notice pleading. Even if that is so, the question would remain whether the same spirit — exacerbated by possible tendencies toward hyper-zealous advocacy — might not lead to equally undesirable results today and tomorrow.

Yet another approach would be to make some modest change in Rule 8(a)(2) to emphasize the often forgotten words: "showing that the pleader is entitled to relief." These words could, if revived, be a strong statement of what notice pleading should be — not a mere identification of an event but a statement that if proved would establish a right to relief. On this view, they knew what they were saying in 1938, but we have wandered from the intended path.

The final suggestion in the agenda materials is that case-specific flexibility might best be achieved by accepting Rule 8(a)(2) as it is and restoring something akin to the bill of particulars practice that was abandoned in 1946. The Rule 12(e) motion for a more definite statement might be expanded from a device to improve pleadings too incomprehensible to support meaningful response into a device that requires statement sufficient to support informed decision of Rule 12 motions for disposition on the pleadings.

Discussion began with the observation that a common-law process of evolution toward more demanding pleading requirements in some situations, to the extent that it happens, is not a bad thing. A requirement that a pleading actually "show" a right to relief is desirable and "policeable." This tendency could be enforced by considering further active integration of Rule 8 pleading standards, Rule 16 scheduling and pretrial orders, and Rule 56 summary-judgment practice, encouraging judges to take an active interest in ferreting out the cases that demand more than barebones "Form 9" pleading. The system seems to work well as it is now. And even a modest change, such as the draft that would require "a short and plain statement of the claim in sufficient detail to show that the pleader is entitled to relief," would excite vigorous and possibly disturbing reactions. Although pleading might seem the last best chance to avoid unnecessary pretrial burdens, it might be better to keep the pleading barriers low and reinvigorate summary judgment.

The next observation was that these possibilities, and the variations that seem to emerge from the cases, are fascinating. But it is important to know whether there is a problem. If lower courts in fact are pretty much doing what a good rule text would have them do, there is little reason to muddy the waters by attempting to ensure that they keep on doing what they are doing anyway. The law of unintended consequences is real.

The Private Securities Litigation Reform Act pleading requirements were noted. The statute emerged from experience that seemed to suggest that too many cases survived for too long because pleading requirements were inadequate and because there were too many tempting targets in corporate balance sheets. Some data on the possible impact of the pleading requirements are available. Information on such matters as the numbers and resolutions of pleading motions are available at Stanford. It would be useful to find out what can be learned from this experience.

It was noted that the PSLRA requirements "frontload the process." A tremendous amount of prefiling investigation is required. A 200-page complaint is not uncommon. But once a motion to dismiss is denied "a case is presumed to have merit." Settlement is discussed after denial of a Rule 12(b)(6) motion, not deferred until after denial of a summary-judgment motion. Settlement

values have increased dramatically, in part because institutional investors are coming in as plaintiffs. At the same time, there remains a cottage industry of lawyers who bring "stock drop" cases that settle for $5,000,000 to $10,000,000. Enough of these cases survive motions to dismiss to warrant filing. The result may be that the number of actions filed has not been much reduced by the heightened pleading requirements.

The question whether trial judges think it would help to change Rule 8 was answered by the information that the Standing Committee has begun to consider these questions. Less than a year ago it convened a panel to discuss the possibility of learning from the American Law Institute project on Principles of Transnational Procedure. Professor Hazard and eminent practitioners addressed fact pleading. The panelists agreed that fact pleading is used now, to educate the judge and to respond to the increasing need to front-load the litigation. The bar would not resist formal adoption of heightened pleading requirements for some types of cases. And courts do want heightened pleading in pro se and prisoner cases. A claim of "conspiracy," for example, may meet a demand for more detailed pleading even though "conspiracy" seems as much a sufficient legal label as the "negligently" label accepted by Form 9.

It was noted that beyond telling a persuasive story, practitioners plead more than notice requires to control the definition of issues and to facilitate discovery within the "lawyer-controlled" sphere of Rule 26(b)(1). The need to show that discovery is aimed at a matter "relevant to the claim or defense of any party" should encourage expanded pleading at two levels — once in detail to establish clearly defined claims and again in broad outline to establish expanded claims that support what otherwise might seem "subject matter" discovery.

This suggestion led to the further observation that there are many cases in which the pleadings are not short, but the length results from pleading too much information. The welter of detail interferes with deciding motions to dismiss and with controlling discovery. A big share of most district-court dockets is filled by pro se plaintiffs — prisoners, employment discrimination plaintiffs, people who are generally dissatisfied and have nowhere else to go. In some ways pro se litigants are held to lower, more forgiving initial standards. But in many ways courts have effectively developed separate procedures for handling these cases, often with the help of staff attorneys. The Prison Litigation Reform Act requires the court to take an early look at a large number of cases, and in effect leads to pleading standards not set out in Rule 8. More definite statements are often required — courts use Rule 12(e) essentially to address interrogatories to the plaintiff to flesh out the complaint, even though that is not the intended purpose of Rule 12(e). And the Fifth Circuit has a "Spears" hearing practice under which a magistrate judge simply asks the prisoner to tell the story. If the system is working, perhaps there is no need to struggle with rules that might articulate flexible principles that correspond to what works best.

Later discussion of prisoner and forma pauperis litigation was similar. Many cases are screened and dismissed without even directing service on the defendant. (It was noted that service in forma pauperis actions can be a problem because it is the marshal's responsibility and often the marshals lack sufficient resources for efficient service.) Prisoner cases are not the source of problems with the pleading rules.

It was noted that one hope for the broad scope of initial disclosures adopted in 1993 Rule 26(a)(1) was that parties would be stimulated to allege facts with particularity in order to expand the adversary's disclosure obligations. The practice endured only for a few years, and only in some districts, but it would be difficult to say whether it actually succeeded in prompting more detailed pleading. The retrenchment of initial disclosure obligations in the 2000 rules was not shaped by any judgment on this issue.

Continuing discussion observed that more definite statements are often required in official immunity cases.

And it was suggested that there are few real problems in cases with lawyers, while pro se litigation "is a world unto itself." But there are lawyer-represented cases that do not yield to a desire for prefiling investigation. Civil rights lawyers, for example, would complain that they cannot realistically uncover needed evidence without discovery. The federal docket does include automobile collisions, slip-and-falls, small business transactions gone bad. Notice pleading may work well in these cases.

Another observation was that much motion practice is not under Rule 12(e) for a more definite statement. Defendants do not want to prompt a more detailed statement of their wrong acts. They use motions to delay the start of discovery, perhaps also with the hope of winning when the plaintiff does not do its job well. But in complex litigation the complaints are not short and plain; they are "long and fancy." These complaints move well beyond the function of simple notice of the claim.

It was suggested that relying on the combination of notice pleading and discovery may raise problems if there is reason to worry about the cost of discovery. And pointed out that one recent action settled for $3,000,000,000 without discovery after denial of a motion to dismiss, and responded that in securities and like litigation there may be less need for discovery because public filings supply much useful information.

Rule 11 was brought back to the discussion, noting that it encourages filing before investigating and wondering why defendants should be made to bear discovery costs when the plaintiff can point to no more than a reasonable hope that its allegations will have evidentiary support after discovery. Toxic tort litigation provides frequent examples of filings that are "way out ahead of the science." The result is five or six years of mostly one-way discovery in which the plaintiffs seek to build from the fact that a contaminant has been released to some evidence of actual harm.

These discussions of complex litigation led to the observation that the Manual for Complex Litigation illustrates methods of management. The spectrum runs from that end to "the most oblique prisoner complaint." Revising Rule 8 is not a likely path of change. A more likely useful idea would be to expand Rule 12(e), establishing greater discretion to demand added detail on a case-by-case basis. This suggestion drew added support. The illustrative draft in the agenda is useful. The cases now say that Rule 12(e) is available only when the responding party cannot reasonably be required to frame a responsive pleading; it is not to be used to elicit greater detail to help determine whether the plaintiff can allege facts sufficient, if eventually proved, to establish a claim. Revision might help. This flexibility would not be used to demand greater detail in every case — there would be little point in attempting to require such detailed pleading of a negligence claim as to support decision on the pleadings. But it could be useful in other areas. Something like this occurs frequently now in official-immunity cases.

Complex litigation came back with the suggestion that the motion to dismiss is attractive to defendants not because complaints fail to state the elements of a claim but because in some areas of the law we have Code pleading in practice. The Dura Pharmaceuticals decision in the Supreme Court this year is an illustration of imposing demands of particularized pleading that are difficult to satisfy.

The immediate question was put: are any of the proposals sketched in the agenda materials, or still others, sufficiently attractive that more information should be sought? Or even to move directly toward shaping a specific proposal? Or should the broad notice-pleading topic simply be held open for possible eventual consideration?

One answer was suggested — the place to look for reform is not Rule 8 but Rule 56 summary judgment. This meeting has shown a live possibility that Rule 56 should become the focus of a major project in any event. But another answer might be that pleading motions really do serve good purposes and should be encouraged by ratcheting up pleading requirements. Yet another may be simply to let things keep "cranking along," reasoning that discovery costs are not disproportionate in most federal-court actions.

Another suggestion was that it would be helpful to learn what district judges around the country think. Do they think they need greater authority to demand more particularity? That they could do more productive things by other means?

One judge suggested that different cases require different things. A direct attack on notice pleading will start a long battle. It is not clear that there is a problem. There are better things to do.

A new thought emerged in the suggestion that a very important practice has developed in the use of "extraneous documents" on motions to dismiss. The practice seems to vary. Much turns on whether a complaint somehow "incorporates" a document, but the test is unclear. Consideration of the document is available on the face of the pleadings if it is incorporated; otherwise it can be considered only by treating the motion as one for summary judgment. It would be useful to find clear and consistent answers.

Another suggestion was that deferral is better. The problem is not notice pleading. It lies instead in a culture of lawyers who are good at discovery, but do not know much about trial. Notice pleading is the heart of the system.

Practice probably varies among different judges. Some judges "go for the jugular," pressing the parties to bring cases on for trial within 12 months. Others are more relaxed, waiting to see what the parties bring to them. The pleading rules should be revised to give the judge greater authority to require details that cut through the fog generated by some cases. Revision of Rule 12(e) may work better than changing Rule 8.

The question was asked directly: "To what end"? If not a change in notice pleading standards, would increased use of Rule 12(e) increase dismissals? We do not now seem to have a fact pleading practice that applies comprehensively to all cases, ordinary and complex alike.

A similar caution was voiced by expressing reluctance to build in a third layer of delay. Motion practice in federal courts often resembles local state practice. Increased use of Rule 12(e) motions would lead to a routine presentation of three motions before trial: a 12(e) motion for a more definite statement, followed by a motion to dismiss, followed by a motion for summary judgment. Each motion builds in delay. And there may be repeated motions for summary judgment, although some courts require that a party seek permission to file more than one.

It was suggested that Rule 12(g) requires consolidation of motions, reducing the risk of multiple motions. But it was responded that often the motions must be considered separately — consideration of a motion to dismiss for failure to state a claim is not likely to be sensible before the court decides whether to require a more definite statement of the claim.

A tentative consensus seemed to be that no one had suggested serious study of the possibility that Rule 8 might be changed to require fact pleading as the basic starting point. That leaves the question whether some less sweeping changes should be studied. The Committee is charged with the task of ensuring that the rules fit evolving needs. These questions might be approached generally, or perhaps as part of a simplified procedure project.

The first recommendation was to do nothing now.

A different recommendation was that it might help to get a better sense of what judges are doing now. Thomas Willging noted that it is relatively easy to undertake a survey that asks the opinions of district judges, but that it is tricky to frame "opinion" questions that will yield actually useful information. A different approach might be to do an electronic survey in a few districts to see what kinds of motions and orders related to pleading are being made. It also might be possible to look for local rules addressing specific categories of cases; some districts, for example, have local rules for patent cases. Standing orders also may address these issues, such as the orders in some districts that require a detailed case statement in actions under the Racketeer Influenced and Corrupt Organizations Act. These possibilities will be pursued further with the Federal Judicial Center, recognizing that requests for its valuable help are constantly at risk of outstripping available resources.

The proposal to seek FJC help was met by asking whether there are identifiable problems that warrant the expenditure of resources. A response was that there has long been a demand for better tools for early management of lots of cases that survive for longer, and at greater expense, than they should. It is difficult to know whether there really is a problem and an opportunity here. It would be useful to find out. But it was rejoined that this Committee represents a good cross-section of experience and perspectives, and has not identified any clear problems. It has been agreed that pro se cases present separate issues. Apart from that, is there a problem? The toxic tort example may not be a pleading problem, but instead a problem of ambitious law and still inadequate science.

An observer suggested that for at least 25 years the Committee has worked toward focusing litigation on the merits. The remaining links to study are notice pleading and summary judgment. Defense lawyers and litigants think it would be useful to study these practices in addition to the ongoing concerns with discovery.

A responding question asked whether there are data showing how cases against corporate defendants get knocked out of the system — does it happen at pleading? On summary judgment? At trial? The answer was that no helpful studies are known.

A tentative summary of the discussion was offered by suggesting that the desirability of enlisting FJC help depends on how great are the strains on their resources. There may be something valuable to be done with pleading, but the level of interest seems to be "cool, not frozen."

So which might come first, pleading or summary judgment? Or might they be done together? With Rule 56 the greatest interest seems directed to the procedures rather than the standards; a collection of local rules could provide real help in suggesting desirable procedures. This is a well-defined project. It is more difficult to articulate the dimensions of a pleading project, particularly if there indeed is consensus that Rule 8 should not be amended.

Perhaps it will turn out that a Rule 56 project could be coupled with some elements of a Rule 8 project. A search of local rules and standing orders could consider both summary-judgment practices and also any identifiable pleading practice rules or standing orders. An electronic docket search also might give a better sense of what courts are doing with asserted pleading deficiencies. It was agreed that this would be a sensible starting point if the FJC is able to undertake it.

It will be more difficult to find a way to identify cases that cannot be dismissed under present pleading practice but that should be dismissed. Perhaps, after the first phase, it will be useful to go to bar groups to ask for advice.

It was observed that the Standing Committee, having already started down the road on this subject, might be interested in considering the question whether there are pleading problems that warrant the arduous work that would be needed to develop proposals for significant change.

Respectfully submitted,

Edward H. Cooper
Reporter

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To: **The Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **The Honorable Susan C. Bucklew**
Advisory Committee on Federal Rules of Criminal Procedure

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

Date: **December 8, 2005**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure met on October 24-25 in Santa Rosa, California, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are an attachment to this Report.

At that meeting, the Advisory Committee approved a package of proposed amendments to Rules 1, 12.1, 17, 18, 32, as well as new Rule 43.1, which implement the Crime Victims Rights Act. Part II of this report summarizes the Committee's consideration of these rules, which it recommends be published for public comment. Part III of this report briefly summarizes two information items, the Committee's continuing work on draft amendments to Rules 16 and 29.

II. Action Items–Recommendations to Publish Amendments to the Rules

The following amendments are part of a package of proposals to implement the Crime Victims Rights Act (CVRA), codified as 18 U.S.C. § 3771. Although the Advisory Committee had earlier proposed an amendment to Rule 32 to enhance victims' rights, the enactment of the CVRA prompted the Committee to withdraw its earlier proposal and develop a more comprehensive package of rules.

The proposed amendments reflect two basic concerns by the committee. First, the CVRA reflects a careful Congressional balance between the rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims. Given that careful balance, the Committee sought to incorporate, but not go beyond, the rights created by the statute. For the same reason, the Committee adopted the statutory language whenever possible. Second the committee believed it would be easier for victims and their advocates (as well as judges, prosecutors and defense counsel) to identify the new provisions regarding victims if they were placed in a single rule. Therefore where possible the committee placed many of the new provisions in a single rule (new rule 43.1) rather than scattering them throughout the rules.

The proposed amendments implementing the CVRA are attached to this report as Appendix A. The Advisory Committee recommends that these rules be published for public comment.

1. ACTION ITEM–Rule 1. Scope; Definitions; Proposed Amendment Defining "Victim"

This amendment incorporates the definition of the term "crime victim" found in the Crime Victims Rights Act, codified as 18 U.S.C. § 3771(e). The statutory definition, which is incorporated by reference, provides that a victim is "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia," and also specifies the legal representatives who may act on behalf of victims who are under the age of 18, incompetent, or deceased. Finally, since the Act provides (18 U.S.C. § 3771(d)(1)), that "[a] person accused of the crime may not obtain any form of relief under this chapter," the final sentence of the proposed rule makes it clear that a person accused of an offense is not a "victim" for purposes of the Rules of Criminal Procedure. Although it considered restating the statutory definition in the text of the rule, the Advisory Committee felt that it would be preferable to follow the precedent of subdivisions (b)(3), (5), (7), (8), and (10), which incorporate various statutory definitions by reference. With this format, no amendment to the Criminal Rules will be required if Congress amends the statutory definition of the term victim.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 1(b)(11) be published for public comment.

2. ACTION ITEM–Rule 12.1. Notice of Alibi Defense; Proposed Amendment Regarding Victim's Address and Telephone Number.

This amendment implements the victims' rights under the Crime Victims Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The amended rule provides that a victim's address and

telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12.1 be published for public comment.

3. ACTION ITEM–Rule 17. Subpoena; Proposed Amendment Regarding Personal or Confidential Information About Victim.

This amendment implements the provision in the Crime Victims Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the existence of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. The amendment seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of a subpoena ex parte, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 17 be published for public comment.

4. ACTION ITEM–Rule 18. Place of Trial; Proposed Amendment Requiring Court to Consider Convenience of Victims.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the defendant and witnesses – in setting the place for trial within the district. It is intended to implement the victim's "right to be treated with fairness" under the Crime Victims Rights Act, codified at 18 U.S.C. § 3771(8). If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 18 be published for public comment.

5. ACTION ITEM–Rule 32. Sentencing and Judgment; Proposed Amendment Deleting Definition of Victim, Amending Scope of Presentence Investigation and Report, and Providing for Victim's Opportunity to Be Heard at Sentencing.

Several amendments to Rule 32 are proposed to implement various aspects of the Crime Victims Rights Act.

First, Rule 32(a) is amended by deleting the definitions of "victim" and "[c]rime of violence or sexual abuse." These definitions were included in Rule 32 because the rule currently provides that victims of these crimes may be present and speak at sentencing. These provisions have been superseded by the CVRA. As noted above, a companion amendment to Rule 1 incorporates the CVRA's broader definition of victim. The amendment would delete all of the text in Rule 32(a). The Committee proposes reserving Rule 32(a), rather than renumbering all of the subdivisions of this complex rule.

Second, the Committee proposes amending Rule 32(c)(1) to make it clear that the presentence investigation should include information pertinent to restitution whenever the law permits the court to order restitution, not merely when it requires restitution. This amendment implements the victim's statutory right under the Crime Victims Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6).

Third, the Committee recommends amending Rule 32(d)(2)(B). The amendment employs the term "victim," which is now defined in Rule 1, and also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a

nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

Fourth, amended Rule 32(i)(4)(B) deletes language which refers only to victims of crimes of violence or sexual abuse. As noted above, the CVRA defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. In light of the proposed amendment to Rule 1(b), incorporating the CVRA's definition of victim, the language in this subdivision is no longer needed.

Subdivision (i)(4)(B) has also been amended to incorporate the statutory language of the CVRA, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4).

Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32 be published for public comment.

6. ACTION ITEM–Rule 43.1. Victim's Rights. Proposed New Rule Providing for Notice to Victims, Attendance at Proceedings, the Victim's Right to Be Heard; Enforcement of Victim's Rights; and Limitations on Relief.

This rule implements several provisions of the Crime Victims Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts. It contains provisions regarding the notice to victims regarding judicial proceedings, the victim's attendance at these proceedings, and the victim's right to be heard, as well as provisions governing the enforcement of victims' rights, including who may assert these rights and where they may be asserted. The proposed rule also incorporates the statutory provisions limiting relief.

Subdivision (a)(1) implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." Although the CVRA does not explicitly state who should provide this notice, 18 U.S.C. § 3771(c)(1) requires all officers and employees of federal agencies engaged in the detection, investigation, and prosecution of crime to "make their best efforts" to see that crime victims are accorded the rights in subdivision (a). The enactment of these provisions supplemented an existing statutory requirement that federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

The proposed amendment requires "the government" to use its best efforts to notify victims of public court proceedings. The Committee was advised that the Department of Justice and the Administrative Office of the U.S. Courts are working together to design procedures for notification.

Subdivision (a)(2) implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim. It closely tracks the statutory language.

Subdivision (a)(3) implements 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing...." It tracks the statutory language.

Subdivision (b) incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted. Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.

Recommendation–The Advisory Committee recommends that proposed Rule 43.1 be published for public comment.

III. Information Items

At its October 2005 meeting, the committee discussed at length two proposed rules that it anticipates will be brought to the Standing Committee's meeting in June 2006.

1. Information Item–Consideration of an Amendment to Rule 29, Concerning Deferral of Rulings on Motions for Judgment of Acquittal.

The question of an amendment that would permit the Department of Justice to appeal erroneous judgments of acquittal has been under consideration since 2003. Although the Advisory Committee at one point concluded that there had not been a sufficient showing of the need for an amendment, the Department of Justice developed additional information supporting an amendment, which it presented to the Standing Committee in January 2005. The Standing Committee then referred the matter back to the Advisory Committee. Working from a draft prepared by a Subcommittee, the Advisory Committee devoted a substantial portion of its October 2005 meeting to discussion of the wording of a proposed amendment. After making several changes, the Advisory Committee referred the draft back to the Subcommittee for additional work on the waiver provisions, which it wished to simplify. The Advisory Committee requested that the Subcommittee present a final draft at the Committee's April 2006 meeting, so that a proposed rule may be presented to the Standing Committee in June of 2006. The Subcommittee has met by conference call, continuing to refine the draft amendment and accompanying committee note.

The Subcommittee's current draft is attached as an information item.

2. Information Item–Consideration of an Amendment to Rule 16, Concerning Disclosure of Exculpatory and Impeachment Information.

This amendment also has a lengthy history. It has been under consideration since 2003, when the Advisory Committee received a proposal from the American College of Trial Lawyers to require the government to disclose exculpatory and impeaching evidence 14 days before trial. Two Subcommittees have considered the issue. The Department of Justice has opposed the amendment. At its April 2005 meeting, the Committee voted in favor of amending Rule 16, but referred the matter back to the subcommittee to address several of the Justice Department's concerns. At its October 2005 meeting, the Committee devoted a substantial part of its agenda to discussion of the most recent Subcommittee draft, and it made several changes in the language of the proposed rule. It then referred the proposal back to the Subcommittee for final refinement of the language, with the intention of taking final action on the proposal at its meeting in April 2006. That timetable would permit the Advisory Committee to bring a proposed rule to the Standing Committee at its June 2006 meeting.

APPENDIX A

DRAFT AMENDMENTS

TO IMPLEMENT

THE CRIME VICTIMS' RIGHTS

ACT

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

(b) Definitions. The following definitions apply to these rules:

* * * * *

(11) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e). A person accused of an offense is not a victim of that offense.

* * * * *

COMMITTEE NOTE

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e). The statute also specifies the legal representatives who may act on behalf of victims who are under the age of 18, incompetent, or deceased. It provides:

> . . . the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime

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

victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

The Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(1), also provides that "[a] person accused of the crime may not obtain any form of relief under this chapter." Accordingly, the final sentence of the rule makes it clear that a person accused of an offense is not a "victim" for purposes of the Rules of Criminal Procedure. This provision would apply, for example, if the accused in a fraud case claims that he too was mislead, and should also be regarded as a victim of the fraudulent scheme.

Rule 12.1. Notice of an Alibi Defense.

* * * * *

(b) Disclosing Government Witnesses.

(1) *Disclosure.*

(A) *In general.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) ~~(A)~~ the name~~, address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and

(ii) ~~(B)~~ each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the

alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests.

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness and the address; and telephone number of each additional witness – other than a victim – if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) *Address and Telephone Number of an Additional Victim Witness.* The telephone number and address of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

* * * * *

COMMITTEE NOTE

Subdivisions (b) and (c). The amendment implements the victims' rights under the Crime Victims' Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

Rule 17. Subpoena

* * * * *

(c) Producing Documents and Objects

* * * * *

(3) **Subpoena for Personal or Confidential Information About Victim.** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim so that the victim has an opportunity to move to quash or modify the subpoena.

* * * * *

COMMITTEE NOTE

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special

concerns because a third party may not assert the victim's interests, and the victim may be unaware of the existence of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

The amendment seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of a subpoena ex parte, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government. The court may approve or reject the subpoena ex parte, or it may provide notice to the victim, who may then move to quash. In exercising its discretion, the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the

offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

COMMITTEE NOTE

By requiring the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district, this amendment implements the victim's "right to be treated with fairness" under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(8). If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered.

Rule 32. Sentencing and Judgment

(a) [Reserved.] ~~Definitions. The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

~~(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or~~

~~(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.~~

~~(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.~~

* * * * *

(c) Presentence Investigation.

(1) ***Required Investigation.***

* * * * *

(B) *Restitution*. If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

* * * * *

(d) Presentence Report.

* * * * *

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) ~~verified~~ information~~, stated in a nonargumentative style,~~ that assesses ~~the~~ any financial, social, psychological, and medical impact on any victim ~~individual against whom the offense has been committed~~;

* * * * *

(i) Sentencing.

* * * * *

(4) ***Opportunity to Speak.***

(A) *By a Party*. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim*. Before imposing sentence, the court must address any victim of ~~a~~ the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to be reasonably heard ~~speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:~~

~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~

~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated~~.

* * * * *

COMMITTEE NOTE

Subdivision (a). The Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

Subdivision (c)(1). This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771. The amendment employs the term "victim," which is now defined in Rule 1. The amendment also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules

of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this section is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4).

Rule 43.1. Victim's Rights.

(a) In General.

(1) ***Notice of a Proceeding.*** The government must use its best efforts to give reasonable, accurate, and timely notice to the victim of any public court proceeding involving the crime.

(2) ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. The court must make every effort to permit the fullest

attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) ***Right to Be Heard.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) **Enforcement and Limitations.** The court must decide any motion asserting a victim's rights promptly.

(1) ***Who May Assert Rights.*** The rights of a victim under these rules may be asserted by the victim or the attorney for the government.

(2) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in

subdivision (a), the court must fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings.

(3) ***Where Rights May Be Asserted.*** The rights described in subdivision (a) must be asserted in the district in which a defendant is being prosecuted for the crime.

(4) ***Limitations on Relief.*** In no case is a failure to afford a victim any right under these rules grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if:

(A) the victim has asked to be heard before or during the proceeding at issue and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

COMMITTEE NOTE

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

Subdivision (a)(1). This subdivision implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

The Department of Justice and the Administrative Office of the United States Courts are working together to design procedures for notification. Eventually it may be possible to generate notices automatically, as is now done in bankruptcy proceedings.

Subdivision (a)(2). This subdivision implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding,

and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Subdivision (a)(3). This subdivision implements 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard any public proceeding in the district court involving release, plea, [or] sentencing...."

Subsection (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims' Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and — in the case of a plea — the defendant did not plead guilty to the highest offense charged.

INFORMATION ITEM

SUBCOMMITTEE DRAFT

RULE 29

PROPOSED AMENDMENTS TO THE CRIMINAL RULES OF PROCEDURE

Rule 29. Motion for a Judgment of Acquittal

(a) Time for a Motion.

(1) ***Before Submission to the Jury.*** After the government closes its evidence or after the close of all the evidence, a defendant may move for a judgment of acquittal on any offense. The court may invite the motion.

(2) ***After a Guilty Verdict or a Jury's Discharge.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. A defendant may make the motion even without having made it before the court submitted the case to the jury.

(b) Ruling on a Motion Made Before Verdict. If a defendant moves for a judgment of acquittal before

the jury reaches a verdict (or after the court discharges the jury before verdict), the following procedures apply:

(1) ***Denying Motion or Reserving Decision.*** The court may deny the motion or may reserve decision on the motion until after a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside a guilty verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

(2) ***Granting Motion; Waiver.*** The court may not grant the motion before the jury returns a verdict (or before any retrial in the case of discharge) unless:

(A) the court informs the defendant personally in open court and determines that the defendant understands that:

(i) the court can grant the motion before the verdict only if the defendant agrees that the government can appeal that ruling; and

(ii) if that ruling is reversed, the defendant could be retried; and

(B) the defendant in open court personally waives the right to prevent the government from appealing a judgment of acquittal (and retrying the defendant on the offense) for any offense for which the court grants a judgment of acquittal before the verdict.

(c) Ruling on a Motion Made After Verdict. If a defendant moves for a judgment of acquittal after the jury

has returned a guilty verdict, the court must set aside the verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

COMMITTEE NOTE

Subdivisions (a), (b), and (c) The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before submission without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. This general rule requiring the court to defer its ruling applies equally to motions for judgments of acquittal made in bench trials. *Cf. United States v. Morrison*, 429 U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to that jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision.

Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences."). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general

model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule clarifies the applicable standard, using the same terminology as subdivision (a)(1). No change is intended.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 24 & 25, 2005
Santa Rosa, California

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Santa Rosa, California, on October 24 and 25, 2005. The following members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Michael J. Elston, Counselor to the Assistant Attorney General
Professor Sara Sun Beale, Reporter

Also participating in the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee liaison to the Criminal Rules Committee
Lucien B. Campbell, Esquire, outgoing member of the Committee
Deborah J. Rhodes, Former Counselor to the Assistant Attorney General
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor David A. Schlueter, outgoing Reporter to the Advisory Committee
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office
James N. Ishida, Senior Attorney in the Administrative Office

Timothy K. Dole, Attorney Advisory in the Administrative Office (by telephone)
Laural L. Hooper, Senior Research Associate at the Federal Judicial Center

Judge Bucklew welcomed the new committee members, Judge Mark L. Wolf, who replaced Judge Paul L. Friedman, and Thomas P. McNamara, who replaced Mr. Campbell as the committee's Federal Defender representative. She also pointed out that this was Professor Sara Sun Beale's first meeting as the committee reporter. She noted that Professor Beale has served for the past year as consultant to the committee as Professor David A. Schlueter completed his service as reporter.

Judge Bucklew expressed the committee's gratitude to Judge Friedman for six years of distinguished service. Judge Friedman was unable to attend the meeting, but Judge Bucklew noted that he would attend the April 2006 meeting in Washington, at which time the committee would present him with a resolution of appreciation.

Judge Bucklew thanked Mr. Campbell, who had just completed six years of service as the committee's Federal Defender representative. She noted that he had participated in "practically every subcommittee" and would be greatly missed. She added that the committee would present Mr. Campbell with a resolution commending him for his service at the committee dinner.

Finally, Judge Bucklew thanked Professor Schlueter for his 17 years of service as the committee's reporter and presented him with a resolution of appreciation. Judge Bucklew noted that his "historic perspective," practicality, and wisdom had proven invaluable to the committee.

II. APPROVAL OF MINUTES

Judge Bucklew moved for approval of the draft minutes of the April 4-5, 2005 committee meeting in Charleston, South Carolina. Following minor corrections, the minutes were adopted.

III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

A. Report From Chief of the Rules Office

Mr. Rabiej reported that Senator Arlen Specter, chair of the Senate Judiciary Committee, was considering several grand-jury reform proposals. The scope of the issues currently under consideration was limited. Among other things, the proposals would allow the Congressional leadership to obtain information about a grand jury investigation upon a written request and would

enhance the showing that prosecutors must make to extend a grand jury's term of service. Congressional review might eventually extend to other issues, however, including several proposals that had previously been considered and rejected by the Advisory Committee on Criminal Rules.

B. Proposed Amendments Approved by the Standing Committee and the Judicial Conference and Being Forwarded to the Supreme Court

Mr. Rabiej reported that the Administrative Office was preparing the package of rules amendments approved by the Judicial Conference at its September 2005 meeting for formal presentation to the Supreme Court. The amendments include:

1. Rule 5. Initial Appearance. The proposed amendment permits transmission of documents by reliable electronic means.

2. Rule 6. The Grand Jury. The amendment is technical and conforming.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits transmission of documents by reliable electronic means.

4. Rule 40. Arrest for Failing to Appear in Another District. The proposed amendment expressly authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who not only fails to appear but also violates any other condition of release.

5. Rule 41. Search and Seizure. The proposed amendment permits transmission of documents by reliable electronic means. It also includes provisions setting forth procedures for issuing tracking-device warrants.

6. Rule 58. Petty Offenses and Other Misdemeanors. The proposed amendment resolves a conflict with Rule 5.1 concerning a defendant's right to a preliminary hearing.

C. Proposed Amendments Published for Public Comment.

Judge Bucklew noted that the following rules had been published for comment in August 2005. Mr. Ishida reported that only one comment had been received to date.

1. Rule 11. Pleas. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by revising the advice the court provides to the defendant during the plea colloquy to reflect the advisory nature of the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by: (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not previously identified; and (3) requiring the court to enter judgment on a special form prescribed by the Judicial Conference.

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B) and specifying that the sentencing guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

There was a brief discussion of the rules published for public comment. Three issues were raised to which the Advisory Committee will return at the conclusion of the comment period.

Judge Jones expressed concern regarding the amendment to Rule 32--which is designed to prevent parties from being blind-sided if the court intends to make a sentencing departure not recommended in a pre-sentence submission--might be worded too narrowly. The proposed rule might be interpreted to require no notice whenever a ground has been previously identified in *any* way, even for a reason other than "for departure." Judge Bucklew said that the concern had been raised at a recent Sentencing Institute, and that the committee recognized the problem.

Judge Bucklew noted another Rule 32 issue discussed at the Sentencing Institute involving the mandated use of a national Statement of Reasons form. The proposed rule states that, following

signature by the judge, "the clerk must enter it." Some judges have understood this to mean that the Statement of Reasons must be "entered" in the public court record. Historically, the Statement of Reasons has not been a public document. Judge Wolf noted, however, that the Massachusetts District Court recently voted to adopt the national Statement of Reasons form but—absent a reason to seal it—to keep it a public court document so judges would remain accountable for their decisions. Judge Bucklew stated that the amendment was not intended to change the status quo regarding the inclusion of the Statement of Reasons in the public record. The Rules Committee was simply responding to the Criminal Law Committee's request that use of the form be nationally mandated.

There was also discussion of proposed Rule 11 amendment's reference to "the court's *obligation* to calculate the applicable sentencing guideline range ... and to consider that range, [and] possible departures under the Sentencing Guidelines...." Ms. Rhodes expressed concern that this language could have an impact on the appellate case law making discretionary departure unreviewable, because the proposed rule deletes the reference to "discretion to depart" and adds the phrase "obligation to consider." Professor Beale noted that the obligation was not to depart, but simply to "consider" departing, a term that by its nature presumes judicial discretion. Judge Levi urged the committee to bear in mind that this is simply the advice given to a defendant who pleads guilty to inform the defendant about the sentencing process. It is therefore important not to make the rule too complicated.

Judge Bucklew noted that each of the proposed amendments would be reconsidered in light of these comments, as well as all of issues raised during the public comment period.

IV. SUBCOMMITTEE REPORTS

A. Rule 29. Proposed Amendment Regarding Appeal of Judgment of Acquittal.

Judge Bucklew briefly recounted the history of the proposal to amend Rule 29. She noted that the Department of Justice in Fall 2003 recommended amending the rule to require that judges defer all rulings on Rule 29 judgments until after a jury has returned a verdict. The Advisory Committee, however, after discussions at several meetings, decided not to proceed with amending the rule. In January 2005, the Standing Committee, at the urging of the Department, referred the matter back to the Advisory Committee. At its April 2005 meeting, the committee approved the concept of revising the rule to require deferral of a Rule 29 ruling unless the defendant consents to waive his or her Double Jeopardy rights and permit the government to appeal an adverse ruling by the trial court. Professor Schlueter had drafted a revised rule and committee note, but the committee had identified a number of thorny problems with the draft. Drafting a rule was then referred to a Rule 29 subcommittee comprised of Judge Bucklew, Judge Trager, Mr. Campbell, Professor King, and Ms. Rhodes.

Professor Beale explained the new draft prepared by the subcommittee. She noted that the reference in the draft to "a defendant" and "an offense," using the singular, was a deliberate acknowledgment of multiple-defendant and multi-offense cases. And as a compromise among subcommittee members, language was added to expressly permit the court to "invite" a Rule 29 motion. The former language had barred the court from doing so "on its own."

Professor Beale explained that the subcommittee had devoted most of its attention to subdivision (b). Under (b)(1), the court's ruling on a motion for a judgment of acquittal is generally reserved until after the jury verdict. Section (b)(2) spells out what a defendant must understand for the waiver to be valid. Section (b)(2)(B) requires the waiver to be made personally in open court, not simply in writing. The rule is designed to take hung-jury cases into account, to give defendants a choice as to whether to have the judge rule on an acquittal motion, and to allow the government to appeal a judgment of acquittal.

Judge Bucklew said the subcommittee had discussed at length whether, absent a waiver, a judge must defer ruling on the motion in all cases until after the jury verdict, even if a judge decides to deny the motion. She added that the subcommittee was also concerned as to what to do when a jury does not reach a verdict.

A discussion of the proposed Rule 29 draft followed.

One member asked what the rationale had been for requiring mid-trial reservation in all cases, even when the judge plans to deny the motion. Ms. Rhodes said the Department of Justice had suggested this provision out of a concern for facial neutrality. If the court can rule mid-trial only if it rules in the government's favor, the rule would appear one-sided, she argued. On a practical level, she added, the revised rule avoids having to make unnecessary waivers.

One member said that the new rule might have the effect of requiring a Rule 11 hearing in every case. Ms. Rhodes disagreed, explaining that if the defendant makes a motion without merit, the court will simply reserve decision, and the trial will proceed. The defendant remains in control of whether to waive his or her rights. Another member wondered, though, whether, as a practical matter, a waiver will be made in every case, since nearly every defense lawyer will want to make the motion. One member responded that, as a member of the subcommittee, he had accepted the proposed rule because it in no way prevents judges from preemptively informing defendants that they will not grant the motion and advising them not to waste their time on filing it. Ms. Rhodes predicted that the rule would not significantly change current practice.

One member wondered how the colloquy would proceed between a judge and defendant, and whether, if the rule were adopted, it would be entirely accurate for a judge to tell a defendant that he or she has a right under the Double Jeopardy Clause to prevent the government from appealing a

judgment of acquittal. He suggested that the language of the rule was awkward and that it would be difficult for the court or a defense lawyer to explain clearly to the defendant his or her rights.

Ms. Rhodes remarked that she thought the subcommittee's language in (i) had been clearer before being restyled. Professor Beale said that the subcommittee had discussed "bar" or "prevent" and that the Style Consultant had changed the term "bar" to "prevent."

Professor King proposed an alternative solution, namely, to re-phrase subdivision (i) in the conditional: "that the Double Jeopardy Clause would bar the government from appealing a judgment of acquittal . . . ." Another member suggested that another sentence would need to be added, explaining that unless the defendant agrees, the judge will be barred from granting the motion. Professor Beale suggested explaining the details further in the committee note. One member said he thought that, while adding clarification in the note might assist attorneys accustomed to the earlier practice, it would not help defendants. Professor Beale said that the subcommittee would grapple with making the language more helpful to a defendant in reaching a decision. Another member suggested modifying Professor King's proposal to say "that the Double Jeopardy Clause would *otherwise* prevent the government from appealing a judgment of acquittal" and to change the word "right" to "protection" in (ii).

One member asked why, if the defendant makes a Rule 29 motion and the judge believes it to be wholly without merit, the judge cannot simply deny the motion outright. Ms. Rhodes said this was not a point the Justice Department felt strongly about. She suggested that the Department had simply sought facial neutrality in the rule.

One member wanted it to be clear that the waiver is only effective if the court *grants* a Rule 29 motion. He expressed concern that line 118 of the note, which states that "the court may rule on the motion for judgment of acquittal before the verdict," could be construed to mean the court can either grant or deny. Professor Beale said the issue remained open to discussion.

One member said there are really three choices on how a court can respond to a mid-trial Rule 29 motion. It can: (a) deny the motion, (b) reserve judgment, or (c) with a waiver, grant the motion. One member emphasized again that a waiver is only effective if the court grants the motion.

Professor Beale suggested the rule could clarify that the judge has the options mid-trial either to deny the mid-trial Rule 29 motion or to proceed to trial. Thus, subdivision (b)(2) might read: "Upon the defendant's request, the court may grant the motion . . . , but only if: . . . ." This formulation might better reflect the point that a judge cannot take a waiver and then deny the motion.

Professor Beale proposed changing line 25 to read that "the court *must* deny the motion or proceed with the trial," and having line 35 read that "the court *may* grant the motion *but only after*

. . . ." One member argued that the "invite the motion" language in the rule is critical because a judge who thinks that a Rule 29 motion is meritorious should be allowed to tell the parties that there is the option to stop the case and go on to an appeal. That course might avoid an unnecessary trial.

One member said the statement in lines 122-124 of the note that "[t]he waiver process is triggered only upon request of a defendant" appeared to be inconsistent with the language in the rule saying "[t]he court may invite the motion." Professor Beale said she thought the language was factually correct, since the waiver itself was entirely under the defendant's control. But concern was expressed that the wording allowed an incorrect inference. Professor Beale explained the subcommittee's concern that defendants not feel coerced to waive a constitutional right, which is similar to the policy that courts not pressure defendants to plead guilty.

Judge Bucklew sought to summarize the posture of the committee. First, the amendment ought to be revised to allow a court to deny the motion prior to verdict. Second, the word "right" should be removed, and the waiver language should be made more "user-friendly." One member added that the committee should do more than simply remove the word "right." It should spell out the options clearly.

Judge Bucklew suggested that the subcommittee consider the committee's comments and revise the draft rule. Although she had originally told the Standing Committee at the June 2005 meeting that the Advisory Committee on Criminal Rules would have a final Rule 29 amendment and note by the January 2006 meeting, the rule would not be published before August 2006. Both the Criminal Rules Committee and the Standing Committee each have one more meeting before then. Judge Levi suggested that perhaps a draft could be presented to the Standing Committee in January. Then the Advisory Committee would have the benefit of the Standing Committee's comments and could re-consider the rule and note at its April 2006 meeting. A final rule could then be presented to the Standing Committee in June. Judge Levi's proposal was approved.

B. Rule 16(a)(1)(H). Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information.

Judge Bucklew briefly summarized the history of the proposed amendment for the new members of the committee. She reported that the American College of Trial Lawyers (ACTL) had first proposed amendments to the Criminal Rules to address disclosure of exculpatory and impeaching information in March 2003. The committee had discussed the proposal at its Spring 2004 meeting, and a Brady subcommittee was appointed, chaired by Mr. Goldberg. At the subcommittee's request, the Federal Judicial Center completed a survey of local rules, administrative orders, and relevant case law in October 2004. The subcommittee then drafted an amendment to Rule 16 for consideration by the committee at its April 2005 meeting. At that meeting by a vote of

8 to 3, the committee endorsed the amendment in principle and asked the subcommittee to continue its drafting efforts.

Judge Bucklew noted that, after further consideration, the subcommittee was now proposing the following amended language:

> (H) *Exculpatory or Impeaching Information.* [Except as provided in 18 U.S.C. § 3500,] upon a defendant's request, the government must make available no later than the start of trial all information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant because it tends to be either exculpatory or impeaching. [The court may order disclosure earlier, but in no instance more than 14 days before trial.]

She also noted that the Department had prepared a new memorandum opposing the proposed amendment, which was included in the committee materials.

One member requested clarification as to whether the committee was simply discussing language changes or whether, given the scope of the latest revisions, the substance of the amendment should be revisited. Judge Bucklew responded that the committee had already approved the amendment in principle at its April 2005 meeting and that its task now was to complete work on the wording. Ms. Fisher said that the Department of Justice understood that the committee had already decided that an amendment was appropriate, that disclosure was important, and that the amendment should be designed not to create serious problems. She argued, however, that the pending proposal went much further than what was originally discussed and well beyond the constitutional standard identified by Supreme Court case law. Unlike the local rules surveyed in the Federal Judicial Center report, the proposed amendment was not merely codifying *Brady*.

Judge Bucklew inquired as to the status of the Department's effort, reported previously to the committee, to amend the U.S. Attorneys' Manual to address concerns raised by the amendment's proponents. Ms. Fisher assured the committee of her personal commitment to work to codify the disclosure obligations in the manual and to include a discussion of best practices. She requested an opportunity to address that task. Mr. Goldberg, the subcommittee chair, commented that although the Department had been talking about amending the manual for more than two years, it had not yet done so. He explained the subcommittee had not attempted to codify *Brady*, but rather to craft a rule of basic fairness that would require prosecutors to provide defense counsel with all exculpatory information—whether or not the prosecutors deemed such information to be material—in a timely manner.

The committee discussed the proposed amendment to Rule 16.

One member supported the rule in principle but expressed concern that the start of trial is too late in the process for exculpatory material to be meaningful, particularly in complex cases. On behalf of the subcommittee, Mr. Goldberg reported that the change reflected a compromise on this issue.

The committee discussed the advisability of omitting a "materiality" standard for information that must be disclosed. One member argued that omitting materiality was necessary to prevent prosecutors from disclosing exculpatory or impeaching information only when they predict that it might cause reversal of a conviction on appeal. Another member supported this view, commenting that, in his long experience as both a federal prosecutor and defense attorney, it was critical that the materiality test be eliminated from the rule.

There was some discussion of how the omission of a materiality standard would affect review on appeal and habeas corpus. On appeal, the addition of a discovery obligation under Rule 16 would allow the defendant to present the failure to provide exculpatory or impeachment information as a rules violation, rather than solely a constitutional violation. As a rules violation, however, the claim would be subject to Rule 52, and accordingly the impact of the failure to disclose would still be considered. However, the government would have the burden of demonstrating that the failure had no impact, instead of requiring the defendant to demonstrate materiality. The standard of review on habeas corpus would not be affected.

The committee discussed whether the language of the rule should refer to "information" or "evidence." Judge Levi noted that the *Brady* standard was "evidence and information that might lead to evidence." He suggested using "evidence or information" in the rule and clarifying the note to say that only information that might lead to evidence is implicated. Professor Beale said she thought "information" included all "evidence." It was noted that Rule 16's current language refers to "information subject to discovery."

Following a brief recess, Judge Bucklew reported that Ms. Fisher had proposed, as an alternative to proceeding with the amendment, allowing the Department to deliver draft language to the committee before its next meeting for possible inclusion in the U.S. Attorneys' Manual. One member asked whether the proposed draft would simply require compliance with *Brady* or do something more. Another asked whether it would retain the materiality standard. Ms. Fisher said she lacked authority to commit to exact language, but while the proposed language would not include every provision in the proposed amendment, it would be more definitive regarding prosecutors' obligations and best practices. After additional discussion, Judge Bucklew stated that the committee looked forward to a proposed change in the United States Attorneys' Manual. The committee then turned its attention to the language of the proposed rule.

Judge Bartle moved that the proposed reference to "information" be retained as drafted. Another member recommended adopting the language of the civil discovery rule, FED. R. CIV. P. 26(b), *i.e.*, "reasonably calculated to lead to discovery of admissible evidence." That is a standard with which courts and practitioners are familiar, unlike "information" that "tends to be exculpatory," whose application would be less clear. The committee discussed whether the language of the civil rule could work in the criminal context. One member suggested the rule would be too broad unless its scope were limited to "admissible evidence or information that could reasonably lead to such evidence." Another noted that the rule limits "information" to "exculpatory or impeaching" information. After further discussion, the committee voted 7 to 4 in favor of the motion to use the word "information" in the proposed rule.

The committee then considered whether the bracketed language "[Except as provided in 18 U.S.C. § 3500]" should be included. One member argued that it should be left up to judges to wrestle with the inherent tension between *Jencks* and *Brady*. Ms. Rhodes said the Department took no position on whether the language should be included. Judge Jones moved to omit the bracketed language. The committee voted in favor of the motion, without objection.

Professor Beale raised the issue in the final brackets, namely, whether to prohibit a court from accelerating disclosure more than 14 days before trial. One member asked why that would be problematic in the case of impeaching information. Ms. Rhodes said that the Department felt strongly that such a provision was necessary so the government could adequately protect lay witnesses during a fixed window of time under its control.

The committee discussed whether proposed language would conflict with local court rules. One member said that his district had a local rule requiring disclosure of evidence negating guilt within 28 days of arraignment. He did not believe that a defense attorney could properly prepare a case for trial if exculpatory evidence were received less than 14 days before trial. Ms. Rhodes said she thought they were only discussing impeaching evidence, and not exculpatory. One member noted that the bracketed language covered both. Another suggested expressly limiting the bracketed sentence to impeaching evidence. One member noted that virtually every court requires disclosure of exculpatory evidence within a certain number of days after arraignment.

Ms. Rhodes noted that since between 93 and 96 percent of federal cases resulted in a plea rather than a trial, it is critical that lay witnesses be exposed only in those cases that actually proceed to trial. One member noted that impeaching information that might be used to impeach a witness or to support a suppression motion clearly should be handled differently from exculpatory evidence, because the latter is critical whether or not the case proceeds to trial.

Professor King moved that the final proposed bracketed sentence (lines 11-12) be limited to apply only to impeaching evidence. The motion was approved by voice vote, without objection.

One member expressed concern that the phrase "no later than the start of trial" could be misinterpreted as setting the day of trial as the presumptive disclosure deadline, even for exculpatory evidence, which he considered too late in the process. Local court rules, as surveyed by the Federal Justice Center, typically require disclosure of exculpatory evidence a certain number of days after indictment or arraignment. Another member said he thought the deadline should also be earlier for information relating to a motion to suppress, because receiving that information on the day of trial is also too late. Ms. Rhodes responded that prosecutors often do not come across such evidence until they are actually preparing a case for trial, often about a month before the trial date.

A member moved that the phrase "no later than the start of trial" be deleted and that each court establish a timetable according to its own local culture. The committee approved the motion without objection and decided to amend the language in the final brackets to "The court may not order disclosure of impeachment information earlier than 14 days before trial."

Judge Levi noted that Standing Committee members had been emphasizing that the fundamental purpose of the federal rules is to achieve a level of national consistency. He predicted the committee would probably have concerns about a system where criminal defendants have significantly different procedural rights that could drive outcomes depending on the district in which they are prosecuted. Another participant agreed and suggested that this type of potential discrepancy among districts could prompt the Standing Committee to launch a criminal local rules project examining all local rules relating to criminal procedures in the federal courts.

The committee considered the phrase "information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant." Specifically, the members discussed whether references to "the government" should be changed to "the attorney for the government" and whether the provisions should be expressly limited to apply only to those persons directly involved in the government's investigation of the specific case at issue. One member argued it would be unreasonable for the rule to cover information that "through due diligence could be known to the government," because doing so would require federal prosecutors to verify every statement made by one law enforcement officer with every other officer at the scene. Ms. Fisher said that the Department would favor eliminating the "due diligence" language and adhering more closely to the standard articulated in the case law, namely, that which is known to the attorney for the government and to agents of the government involved in investigating the case. Ms. Fisher moved to change the amendment to read "all information that is known to an attorney for the government or to any law enforcement agent involved in the case." The motion was approved in a voice vote without objection. It was noted that the second use of the term "government" in line 11 should then probably be changed to "they."

Professor Beale requested committee discussion of the Department's contention that the combined effect of "may" and "tends to" in the proposed amendment produces too broad and

amorphous a standard. One member moved to change "may be" and "tends to be" to "is" in the phrase "has reason to believe *may be* favorable to the defendant because it *tends to be* either exculpatory or impeaching." The committee approved the motion.

Judge Bucklew suggested that the approved changes be made in the rule and the committee note and that the revised rule and note be reconsidered by the subcommittee and then the full committee at its April 2006 meeting.

The committee discussed whether "exculpatory information" should be defined further in the note. One member moved that the note clarify that if information can reasonably be considered both impeaching and exculpatory, the timing rules governing exculpatory evidence should apply. A majority of the committee voted against the motion by voice vote. Another member moved to define "exculpatory" as any evidence that would negate a defendant's guilt as to any count. The committee voted in favor of the motion, without opposition.

C. Rules 1, 12.1, 17, 32, 43.1 (Crime Victims Rights Act package of rules)

Judge Bucklew gave a brief explanation of the background. She reported that the committee had approved an amendment to Rule 32 to enhance victim rights. It had been proceeding through the rules process, but the enactment of the Crime Victims Rights Act (CVRA) by Congress had caused the Judicial Conference to ask the Supreme Court to withdraw the proposed rule. The enactment of the CVRA prompted the committee to consider developing a broader package of changes. She noted that she had appointed an ad hoc subcommittee, chaired by Judge Jones, to evaluate suggestions on how best to amend the criminal rules in light of the new legislation. The other members of the subcommittee are Judge Battaglia, Justice Edmunds, Professor King, and Ms. Rhodes. The subcommittee, she noted, had carefully reviewed a set of proposals in a lengthy article prepared by Judge Paul Cassell.

Judge Jones reported that the subcommittee had reached two major decisions early on. First, they decided they should be somewhat conservative in their approach and not create rights beyond those provided by the Act. Second, the subcommittee decided to place most of the amendments in one major rule, Rule 43.1, rather than scatter the provisions throughout the rules. In addition to new Rule 43.1, the subcommittee was also proposing amendments to the following rules: Rule 1, Rule 12.1, Rule 17, Rule 18, and Rule 32.

Judge Jones explained that the subcommittee had decided to define "victim" in Rule 1 by referencing the statute itself. He added that an amendment to Rule 12.1 would still require government disclosure of the identity of a victim who is also a witness on the issue of alibi, but the victim's address and telephone number would be disclosed only if the court is satisfied that they are

needed. Professor Beale reported that several non-substantive numbering changes to Rule 12.1 had been proposed by the Style Consultant after her memorandum of September 19, 2005.

Judge Jones described the proposed change to Rule 17 that would prohibit subpoenas for "personal or confidential information about a crime victim" absent a court order. The court would have the discretion to require that the victim be notified and given an opportunity to move to quash. There was a discussion about whether such a motion would be brought by the government or whether the victim would have to retain counsel. Judge Jones said he thought the government would have standing to represent the victim. Professor Beale noted that the rule does not address exactly what information the government needs to provide victims. Judge Jones said one option would be to place the bracketed material in the proposed rule in the note, given concerns over premature disclosure of the government's theory of the case and work product. Professor Beale noted that the rule says only that the court "may" require, letting the court decide whether to give notice and, if so, what such notice should include. Judge Jones explained that requiring notice in all cases would seem inappropriate in cases involving, for instance, national fraud, where there are balancing factors the court should consider.

Regarding Rule 32, Judge Jones explained the several changes. First, the definition was deleted as no longer applicable. The bracketed phrase "victims [of the crime]" was suggested for subdivision (d) to make clear that it only concerned victims of the crime in question, not victims of other crimes. Professor Beale stated that words such as "verified" and "nonargumentative style" had been deleted to make the wording of the rule more neutral. Judge Jones noted that language about the victim's right to be heard had been left in the "Sentencing" section because the current rule already contained language to that effect. Professor Beale commented that the subcommittee had tried to stick as close as possible to the statutory language and the congressional compromises reflected in the Act. She explained that the phrase "reasonably heard" had come directly from the statute and that courts would have to construe exactly what it meant as situations came before them. Judge Jones noted that future experience could well reveal the need for further victim-related provisions.

Judge Jones said that proposed Rule 43.1 was the main rule setting forth victims' general rights. The subcommittee's conclusion was that this should not be simply a restatement of legal rights, but should specify what needs to be done and when. Some decisions on what and when, though, had yet to be reached. For instance, the proposed rule requires notice of "any public court proceeding involving the crime" and it is not clear whose burden it would be to provide such notice. The Justice Department, which is working with the Administrative Office on a system, is arguably in a better position to do that, since courts often do not know who the victims are, particularly early on. Because of the collaboration between the Department and the Administrative Office on designing a notification system and because certain statutes required other agencies to provide the

notice, Professor Beale recommended retaining the passive phrasing. There was further discussion on who is responsible for notifying victims under the CVRA.

One member asked why the rule omitted reference to "parole proceeding" as mentioned in 18 U.S.C. § 3771(a). Professor Beale explained that parole proceedings were outside the scope of the criminal rules, as they take place before parole boards rather than the courts.

One member questioned the practice of restating statutes in the rules. He asked whether it is necessary, for instance, to restate the Jencks Act in the rules. Judge Jones said the subcommittee believes that it is important to clarify certain procedural aspects of the Crime Victims Rights Act in the rules. Professor Beale said there seemed to be a widespread expectation that the federal rules themselves covered all major court procedures. One participant noted that courts were being discouraged from restating federal rules in their local rules, because such restatements: (1) might not be accurate, and (2) might create an expectation that a procedure was less important if not restated in the local rules. Those same considerations might apply to restating federal statutes in federal rules. Professor Beale noted that certain victim rights had existed prior to the legislation, but had been buried in Title 42. The Act had raised the profile of victim rights, and there was a feeling that they should be accorded similar prominence in the rules.

One member asked about the phrase "[district] court" in subdivision (a)(3). Professor Beale said there was a desire to make clear that the rule does not apply, for instance, to a sentence-related hearing in the court of appeals. There was a discussion of whether these rights apply to a civil habeas corpus hearing. One member wondered whether the rules should make it clear that these rights do not apply to oral arguments before a court of appeals or in a civil forfeiture proceeding. Judge Jones responded that was precisely why some had suggested including the bracketed word "district." Professor Beale noted, though, that while victims have no right to be heard in an oral argument, they probably do have the right to be notified that the oral argument is taking place. Although the rule recognizes the right to notice in "any public court proceeding," it restricts the right to be heard to proceedings "involving release, plea, or sentencing involving the crime."

Professor Beale asked whether there was committee support for changing (a)(2) and (a)(3) and the Style Consultant's suggestion for titling subdivision (a) "Rights of Victims – In general." There was no objection to this suggestion.

Judge Levi expressed concern over the final phrase in Rule 43(1)(b)(3), which gives a victim the right to assert rights "if no prosecution is underway, in the court in the district in which the crime occurred." Judge Jones said the Crime Victims Rights Act affords victims certain rights even in the absence of a case. Judge Levi noted, however, that the criminal rules only apply to proceedings in filed cases. Judge Jones explained that the subcommittee had decided to include it because there might be a pre-prosecution proceeding of some sort to which the provision might apply. There was

discussion as to whether a grand jury investigation might qualify as such. Professor Beale said that, while the Act might give victims certain rights, such as being treated respectfully, Judge Levi was probably correct that the rights covered by the criminal rules could only be asserted with respect to a case being prosecuted. After further discussion, Judge Jones said the phrase would be deleted, as Judge Levi had suggested.

Several language change suggestions were discussed. One participant asked whether the subcommittee had considered excluding the criminal defendant for all purposes from the definition of victim. There was discussion over whether a victim accused of the crime or a victim co-defendant would be included. Professor Beale said she thought that a contradiction existed in the statute. Concern was also expressed about the numerous references to "rights" in the context of federal rules. One member suggested changing the beginning of Rule 43.1(b)(4)(A) to "the victim has asked to be heard." Another suggested that the reference to "right under this rule" in Rule 43.1(b)(4) should be changed to "right under these rules," because a few victim rights had been placed in rules other than Rule 43.1. Professor King expressed concern that such broad language might implicate other criminal rules that arguably include "rights" affecting victims—e.g., speedy trial, open trial, sequestration—which, if denied, might indeed "provide grounds for a new trial." It was suggested that the committee wait to see if others expressed this concern during the public comment period. Another member urged retention of the bracketed language "[which may be granted ex parte]" in Rule 17 (p. 6, line 10). There was also discussion about how the definition of "victim" in Rule 1(b)(11) and the note should be worded to exclude someone accused of the crime, so as to prevent a defendant from claiming to be a victim and trying to claim victim rights.

Returning to Rule 32, a participant suggested that the proposed addition to Rule 32(d)(2)(B) read "any financial" instead of "the financial" (line 29), and "any victims" instead of "victims" (line 30). He also recommended against including the bracketed phrase "[of the crime]" (line 31), because the definition of "victim" has already been limited to the relevant crime in Rule 1(b)(11). Several members voiced support for such changes. The participant also suggested replacing one of the two instances of the word "involving" in Rule 43.1(a)(3), possibly with "concerning."

There was a discussion whether deleting subdivision (a) from Rule 32 would require renumbering the remaining subdivisions of that rule or whether it should simply be "reserved." Support for the latter was expressed. Professor Schlueter suggested as an alternative that Rule 32(a) be revised to state: "The term 'victim' is defined in Rule 1."

Judge Bucklew set forth two options on how to proceed: (1) the subcommittee could make the changes just discussed and place the rule back on the next meeting's agenda; or (2) the changes could be circulated to the subcommittee and the committee could send a revised version to the Standing Committee with a recommendation to publish with the changes just discussed along with

those proposed by the Style Consultant. Judge Jones moved that the latter option be pursued. The motion carried without objection.

V. PENDING RULES PROJECTS

Status Report on the Rules Time Computation Project

Judge Mark Kravitz, chair of the Standing Committee's Time-Computation Subcommittee, reported on the status of the Time Computation Project. The subcommittee, comprised principally of practicing lawyers, is focusing first on how time is computed (e.g., not counting weekends when a period is shorter than 11 days). Professor Patrick J. Schiltz, who serves as the subcommittee's reporter, had prepared a memorandum on the topic, which had been circulated to the reporters of the Standing Committee and the advisory committees. The subcommittee met and discussed adopting a "days are days" principle. They also discussed the "three-day rule" and instances of court inaccessibility in an electronic age (e.g., court servers down but courts up, or servers up but courts closed).

Judge Kravitz said that the subcommittee would try to craft a template that could be used across the rules, as recently done with the privacy rules. He hoped the time-computation principles would be considered by the Standing Committee in January 2006. The advisory committees would then be asked to comment in Spring 2006. If the Standing Committee adopted the proposed principles at its mid-2006 meeting, they would be placed on hold. Each advisory committee would be asked to consider "translating" deadlines determined under the old rules into new deadlines calculated under new time-computation rules. The subcommittee would serve only as a clearinghouse for evaluation of such deadlines. Deadline changes approved by the advisory committees would then be collectively evaluated by the Standing Committee in 2007. The public would be presented with both the revised time computation standards and the deadline changes at the same time.

One member advocated adopting a simpler, "multiple of seven" deadline system. Judge Kravitz said he thought the subcommittee might eventually recommend that approach, but that it was up to each advisory committee to decide. Another member wondered whether the three-day rule should be eliminated. Judge Kravitz said it might not, because of concerns that changing the rule might provide unwelcome incentives to use certain forms of service.

VI. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Rules 4 and 5, Professor Malone's Proposal

Judge Bucklew invited the committee's consideration of the proposal by Professor Linda Malone, Marshall-Wythe Professor and Director of Human Rights and National Security Law at William & Mary School of Law that Rules 4 and 5 be amended to provide that foreign citizens be advised of their right to contact the consulate of their country whenever they are either served with an arrest warrant or arraigned, in accordance with Article 36 of the Vienna Convention. The committee had tabled the proposal at its April meeting, given that a case examining the enforceability of the Vienna Convention was then pending before the Supreme Court. The Court later dismissed certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088 (May 23, 2005). A habeas corpus petition was then filed in a Texas court. The case is still pending.

Mr. Elston stated that the Department of Justice already has internal policies in place advising U.S. attorney's offices of how to proceed and making notification mandatory for defendants from certain countries. Although there are occasional mistakes and omissions, the Department believes that there is no problem that requires a rule, at least not in the federal courts. Judge Bucklew noted that the Texas court had not yet ruled in the *Medellin* case. One member suggested that a rule might indeed be warranted, because the United States had undertaken this obligation in a treaty and yet he had never heard anyone, either in state or federal court, report that they had read a defendant "his Miranda rights and his right to contact the consulate." One member said that he did not believe that the exclusionary rule applies—or should apply—and he did not think that the committee should spend too much time considering this rule, because it would not likely be adopted.

Judge Bucklew said that her district sees a lot of foreign nationals who arrive by boat. She wondered whether agents of the Federal Bureau of Investigation are in fact notifying all of them of their rights under the Vienna Convention. The Justice Department representatives responded that, depending on the country of origin, notification is mandatory. Actually, though, detainees sometimes ask U.S. officials *not* to notify their country of origin. Occasionally, it is not known that a defendant is a foreign national. The Department expressed concern over a federal rule's potential legal ramifications. The Department does not consider such notification discoverable and does not turn it over to defense counsel. One member asked how it would be known whether notification has taken place. The Department said that it kept a record and that, during counsel's interview through a translator, the client could confirm notification. The Department said that it already had every incentive to honor this right, because many Americans travel abroad and want this right honored by foreign governments.

Following discussion, the committee voted to table the proposal indefinitely. Judge Bucklew noted that the proposed amendments could be re-visited at a later date if new developments warranted.

B. Rule 10, Waiver of Arraignment, Judge McClure's Proposal

Judge Bucklew then invited consideration of a proposal by Judge James F. McClure, Jr. that Rule 10 be amended to permit waiver of arraignment, not just waiver of a defendant's *appearance* at arraignment. Such a waiver is reportedly allowed in state court in two counties of Pennsylvania. The issue had been tabled at the Spring meeting. Judge Bucklew noted that the arraignment was a triggering event for five other criminal rules, so waiving the arraignment might prove problematic. Judge McClure had suggested that the amendment would save both money and time for the courts.

One member argued that waiving the arraignment would save little court time in southwestern states with a majority of fast-track cases where prosecutions are filed by information rather than by grand jury indictments, because defendants would still have to be present to waive Rule 7 indictment. Another member reported that, in his court, arraignments always take place on the day of trial. One member noted that arraignments represent more than pro forma hearings, because it is often the first time lawyers meet with their clients. Following discussion, the committee voted to table the proposal indefinitely.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew reminded the members that the next committee meeting was scheduled for April 3-4, 2006, in Washington, D.C.

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2005**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 14, 2005, in Washington, D.C. At this meeting, the Committee continued its work on a rule to be submitted to Congress on waiver of privileges. It also continued to monitor developments in the law of confrontation after *Crawford v. Washington* and to consider whether any amendments to the Evidence Rules are necessary as a result of that decision. Finally, the Committee reviewed and approved in principle a proposed amendment that would make it plain that the Evidence Rules cover evidence presented in electronic form. None of these projects requires action by the Standing Committee at this time.

Part III of this Report provides a summary of the Committee's projects. A complete discussion of these matters can be found in the draft minutes of the Fall 2005 meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Project To Develop a Rule on Waiver of Privileges

The Committee is addressing a number of problems arising from the current federal common law on the waiver of privilege. In complex litigation lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. Under current law, if a privileged document is produced in litigation there is a risk that a court will find a subject matter waiver; that is, there might be a finding that the waiver applies not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production to protect against the inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. The Committee has also found that counsel's understandable fear of waiver leads to extravagant claims of privilege. The Committee has concluded that the discovery process could be made less expensive if the law on waiver of privilege is modified to make it more predictable, more uniform, and less draconian.

Beyond the problems of the current waiver doctrine as applied to discovery, a serious concern arises if a corporation cooperates with a government investigation by turning over a privileged report. Most federal courts have held that this disclosure constitutes a complete waiver of the privilege, so that the report can be used against the corporation in subsequent litigation with a private party. The courts' refusal to protect a limited disclosure, made in cooperation with government regulator, can deter corporations from cooperating in the first place.

At its Fall 2005 meeting the Committee began its consideration of a rule governing waiver of privileges that would provide the following:

1. Inadvertent disclosures would not constitute a waiver so long as the producing party acted reasonably in trying to maintain the privilege and promptly sought return of the privileged material.

2. Disclosure of privileged information to a government agency would not constitute a waiver for all purposes, so long as the producing party and the government entered into a confidentiality agreement.

3. A waiver of privilege would cover only the information disclosed, unless fairness required a broader subject matter waiver.

4. A court could enter an order protecting against the consequences of waiver in a case, and such an order would be binding on third parties.

5. Parties could enter into agreements protecting against the consequences of waiver in a case, but those agreements would not bind third parties unless they were incorporated into a court order.

Of course, rules governing privilege must be enacted directly by Congress. Yet the Rules Enabling Act contemplates the use of the rulemaking process for privilege rules, so long as the rules are affirmatively enacted by Congress at the end of that process. The Committee has therefore resolved to prepare a proposed Rule 502 governing waiver of privileges. The precise language of such a rule raises many complicated issues that the Committee plans to address at its next meeting. The Committee has invited liaisons from the Civil and Criminal Rules Committees, and representatives of the Justice Department, to consult with it on this important project.

B. *Crawford v. Washington*

The Committee continues to monitor caselaw developments after the Supreme Court's decision in *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against the accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. The Court in *Crawford* declined to define the term "testimonial" and also declined to establish a test for the admissibility of hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Committee is monitoring the caselaw to determine whether and when it might be necessary to propose amendments to bring the hearsay exceptions into compliance with constitutional requirements. The Supreme Court has granted certiorari in two state cases that present the issue of whether certain hearsay is testimonial, and the Committee will monitor those decisions to determine their effect on the hearsay exceptions in the Federal Rules.

C. Rule 804(b)(3)

At its Fall 2005 meeting the Committee considered whether to revive its proposal to amend Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest. The Committee's previous proposal was approved by the Judicial Conference, but the Supreme Court remanded it for reconsideration in light of the intervening decision in *Crawford*. The Committee's Reporter suggested revisions to the previously proposed amendment to address some of the concerns about testimonial evidence raised in *Crawford*. The Committee determined that the proposal should

not be adopted at this point, because further time is necessary to determine the meaning and application of *Crawford.* Deferring the proposal was considered especially prudent because of the Supreme Court's recent grant of certiorari in two cases to determine the correct scope of the term "testimonial," the definition of which was left open in *Crawford.*

D. Constitutional Limitations on Hearsay Admitted Under the Federal Rules Exceptions

Although the Committee decided not to propose an amendment to Rule 804(b)(3) at this time, it remains concerned that hearsay statements admitted under some of the Federal Rules exceptions would violate the right to confrontation after *Crawford.* The Committee has long taken the position that rules should be amended if they are subject to unconstitutional application; otherwise the rules become a trap for the unwary, because counsel may not make a constitutional objection under the assumption that the rules would never allow admission of evidence that violates a party's constitutional rights.

The Committee will therefore consider at its next meeting a proposal to amend either the hearsay rule, or its exceptions, to provide that admissibility of hearsay must be consistent with the constitutional rights of an accused. A generic reference to the constitutional rights of the accused does not run the risk of being inconsistent with the Supreme Court's subsequent interpretations of the Confrontation Clause. Moreover, there is precedent for generic constitutional language in the Evidence Rules: Rule 412 provides that evidence must be admitted (despite the exclusionary language in the Rule) where exclusion would violate the constitutional rights of the accused.

E. Electronic Evidence

At its Fall 2005 meeting the Committee considered a possible amendment that would make it plain that the Evidence Rules cover evidence presented in electronic form. The amendment would add a new Rule 107 that would provide as follows:

> *Evidence in Electronic Form.* As used in these rules, the terms "written," "writing," "record," "recording," "report," "document," "memorandum," "certificate," "data compilation," "publication," "printed material," and "material that is published" include information in electronic form. Any "certification" or "signature" required by these rules may be made electronically.

The Committee determined that the courts are not having much trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. Courts have been using basic evidentiary standards—relevance, reliability, prejudice, accuracy, authenticity—to determine the admissibility of electronic evidence. The goal of the proposed amendment would not be change or

affect any of the current evidentiary standards being applied to electronic evidence; rather, the goal would be to bring the language of the Evidence Rules up to date with technological changes.

After discussion, the Committee agreed that the amendment would be a good addition to the Evidence Rules, but it also determined that there is no pressing need to proceed immediately on the amendment. The Committee resolved to adhere to its practice of proposing amendments as a package where possible, thus avoiding yearly changes to the Evidence Rules. The proposed amendment was tentatively approved as part of any package of amendments that the Committee might propose in the future.

IV. Minutes of the Fall 2005 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2005 meeting is attached to this report. These minutes have not yet been approved by the Committee.

MEMORANDUM

BY

PROFESSOR KENNETH BROUN,
CONSULTANT, EVIDENCE RULES COMMITTEE

POSSIBLE STATUTE CONCERNING WAIVER OF PRIVILEGE

Memorandum To: Advisory Committee on Evidence Rules
From: Ken Broun, Consultant
Re: Possible statute concerning waiver of privilege
Date: October 12, 2005

Waiver of privilege problems frequently arise in large document litigation. The issues usually involve the attorney-client privilege, but may involve other privileges as well. There are at least three distinct, but sometimes overlapping, problems:

1. The effect on a privilege of an inadvertent production of a privileged document ["inadvertent waiver"].

2. The scope of the waiver of a document produced either intentionally or inadvertently ["scope of waiver"].

3. The effect on future privilege claims of the production of documents in the course of a government investigation, either with or without a confidentiality agreement entered into with the government agency ["selective" or "limited" waiver referred to in this memorandum as "selective waiver"].

Concern that privilege may be waived even by an unintended disclosure of a document will cause counsel and his or her staff to spend countless hours reviewing documents in large volume cases to insure against inadvertent disclosure. The rule applied by many courts that waiver of privilege by disclosure of a single document is a waiver of privilege with regard to all communications dealing with the same subject matter will cause counsel to guard against disclosure of privileged documents even though counsel may not really care if a particular document is disclosed to opposing counsel. The likelihood that disclosure of documents to a government agency may result in waiver of privilege as against other parties may limit a party's willingness to cooperate fully with a government investigation.

With regard to the inadvertent waiver and scope of waiver issues, the cases differ widely on such matters as the effect of an inadvertent disclosure and the scope of the subject matter if a waiver or forfeiture is found. Stipulations or case-management orders saving the privilege, at least against inadvertent disclosure, have become common. Nevertheless, as will be discussed, such orders are of somewhat limited usefulness.

With regard to selective waivers, most federal circuits hold, at least without a confidentiality agreement, that a party may not selectively waive a privilege. In other words, disclosure to a government agency literally destroys the privilege. One circuit, the Eighth, holds to the contrary. The other circuits are split on whether the existence of a confidentiality agreement with the government agency preserves the privilege against the rest of the world.

This memorandum seeks to flesh out the dimensions of these interrelated problems, to discuss the case law dealing with the issues, and to propose some statutory models intended to ease the burden on the courts and counsel.

Inadvertent waiver and scope of waiver: the problem

The best formal statement of these two related problems is contained in Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1606-07 (1986).

Marcus sets forth the concerns as follows:

> . . . [E]normous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process. Although commendable, these orders appear totally unenforceable under classical waiver doctrine.

See also, Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege,* 2000 Wis. L. Rev. 31, 73; Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished,* 47 Duke L. J. 853 (1998).

Although the Marcus piece is now almost twenty years old, its description of the problem is still largely current. Perhaps the only things that have changed are the even more frequent use of protective orders to deal with inadvertent disclosures in discovery and the added complexities caused by the increasing existence of electronically stored information.

The Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004) dealing with proposed amendments concerning electronic discovery specifically notes the problem as well as the attempts of parties to deal with the issue by protocols minimizing the risk of waiver.[1] The Committee notes (p. 8):

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[1]The Civil Rules Advisory Committee elected to use the term "waiver" in connection with even inadvertent or unintended disclosures of privileged material. Technically, such disclosures may result in a "forfeiture" rather than a "waiver," which by definition would be intentional. Nevertheless, the courts have consistently used the term "waiver" in connection with unintentional disclosures, and this memorandum and proposed model statutes continue that use of terminology.

Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The Civil Rules Committee Report cites the Manual for Complex Litigation (4th) § 11.446, setting forth the same issue:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.[2]

The Civil Rules Committee's concern for the problem is reflected in its proposed amendments to Rules 16(b)(6) and 26(f)(4) and Form 35 providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.

However, although a protective or case-management order may be quite useful as among the parties to a particular litigation, it is likely to have no effect with regard to persons or entities outside the litigation. As Marcus indicates in the statement quoted above, protective orders "appear totally unenforceable under classical waiver doctrine."

Moreover, even if the courts were to hold that a stipulation or protective order is effective to guard against waiver with regard to parties outside the litigation, problems still exist. For

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[2]An example of a case-management order dealing with disclosure of privileged documents is contained in *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1995 WL 411805 at * 4 (Del. Super.Ct. Mar. 17, 1995), where the court quotes the order as stating:

> The production of a privileged document shall not constitute, or be deemed to constitute, a waiver of any privilege with respect to any document not produced. The production of a document subject to a claim of privilege or other objection and the failure to make a claim of privilege or other objection with respect thereto shall not constitute a waiver of a privilege or objection. . . .

example, such orders may deal only with inadvertent disclosures. Questions may and do arise under such orders as to what is an inadvertent disclosure. *See Baxters Travenol Labs., Inc. v. Abbott Labs.,* 117 F.R.D. 119 (N.D. Ill. 1987) (disclosure not inadvertent under the circumstances).

Thus, an order requiring the return of inadvertently disclosed document may help in the instant litigation, but it still requires careful counsel to claim privilege even where she doesn't care about disclosure.

Because both concepts are important to a discussion of possible legislative remedies for the above described problem, the next two sections of this memorandum attempt briefly to describe the case law on 1) the effect of inadvertent waiver and 2) the scope of waiver based upon disclosure of documents during the litigation process.

Inadvertent waiver

The courts have taken three different approaches to inadvertent disclosure: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; 3) inadvertent waiver may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.

Perhaps the fewest number of cases take the first approach finding no waiver from inadvertent disclosure. The leading case is *Mendenhall v. Barber-Greene Co.,* 531 F. Supp. 951, 955 (1982). The court stated:

> Mendenhall's lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the *client's* welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. [citing *Dunn Chemical Co. v. Sybron Corp.,* 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975)] No waiver will be found here.

See also Conn. Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege).

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.,* 120 F.R.D. 445, 449-50 (D. Mass. 1988). The court in *International Digital Systems* analyzed the three different approaches to inadvertent disclosure. The court is particularly critical of the

approach that analyzes the precautions taken, noting that if precautions were adequate "the disclosure would not have occurred." It added:

> When confidentiality is lost through "inadvertent" disclosure, the Court should not look at the intention of the disclosing party. . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

The court adds that a strict rule "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure." 120 F.R.D. at 450.

The court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). In that case, the court stated:

> The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); *Ares-Serono v. Organon Int'l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank*, F.S.B. 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

The third or balanced approach is also taken by a significant number of courts. Many decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure set forth in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). In *Hartford Fire*, the Court relied upon the analysis in an earlier case, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), which had found the following elements significant in deciding the existence of a waiver, calling it the "majority rule":

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness."

The court in *Hartford Fire* found there had been waiver under the circumstances.

Other cases among the many taking a similar balancing approach to inadvertent disclosure include *Alldread* v. *City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental privilege); *Zapata v. IBP*, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product privilege); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client

privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege).

For more detailed descriptions of the various approaches *see* John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law,* 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts,* 1998 U.Ill. L. Rev. 643, 659.

The scope of waiver based upon disclosure of documents during the litigation process

A decision that an inadvertent disclosure results in waiver with respect to the disclosed document does not necessarily mean that the privilege is waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to a disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.* 132 F.R.D. 204 (N.D. Ind. 1990), the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating (132 F.R.D. at 208):

> Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter. [citing Marcus, *supra,* at 1636].

International Digital Systems Corp. v. Digital Equipment Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988), discussed above, is a leading case for the strict approach to inadvertent disclosure. Yet, the court in that case refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 116 F.R.D. 46, 52 (M.D.N.C. 1987), the court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

> The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley,* other courts have in fact found subject matter waiver even where the disclosure was inadvertent. *E.g., In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir. 1984); *Nye v. Sage Prods., Inc.* 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D.S.C. 1974) (statement of intent not to waive privilege ineffective); *Malco Mfg. Co. v. Elco Corp.,* 307 F. Supp. 1177 (E.D. Pa. 1969) (attempt to reserve privilege ineffective).

Other courts have applied a subject matter waiver but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.,* 434 F. Supp. 136, 156 (D. Del. 1977), the court applied subject matter waiver but noted:

> The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.

See also In re Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Inv./Indicators, Research and Mgmt., Inc.,* 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court, the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis,* 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455 (D.C. Cal. 1978) (same).

The Marcus article surveys the cases up to that point in time in great depth. The author uses the case of *Transamerica Computer Co. v. IBM,* 573 F.2d 646 (9th Cir. 1978) as an example of a court that appropriately considered the circumstances of the case in determining the existence of waiver. In *Transamerica Computer*, the court considered whether the inadvertent disclosure of documents in an earlier case waived the privilege in this case. The court determined that it did not, based upon the extreme logistical difficulties of protecting documents in the earlier case.

Marcus argues that waiver should be analyzed in terms of fairness, stating, "the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the privilege in some way." (84 Mich. L. Rev. at 1627). Elsewhere in the article, the author states (84 Mich. L. Rev. at 1607-08):

> This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .
>
> Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.

Marcus expands on his "truth garbling" point later in the article where he raises the possibility that the use of disclosed information, while still protecting other information through the exercise of the privilege, might result in a distortion of the facts. He refers to cases involving the Fifth Amendment privilege against self-incrimination, including *Rogers v. United States,* 340 U.S. 367, 371 (1951). Marcus notes (84 Mich. L. Rev. at 1627-28):

> Similarly with the attorney-client privilege, the courts have condemned "selective disclosure," in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable. It is the truth-garbling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers.

Even where there is no use of the disclosed communications by the privilege holder, it is also possible that the matter disclosed has become so much a part of the common knowledge that protection of the other communications dealing with the same subject matter makes no sense. Marcus states (84 Mich. L. Rev. at 1641- 42):

> At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong. Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn "selective disclosure" to some but not others.

Selective Waiver[3]

Only the Eighth Circuit has held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency. Other courts have suggested that a selective waiver may apply if the client has clearly communicated his or her intent to retain the privilege, such as by entering into a confidentiality agreement with the federal agency. The First, Third, Fourth, Sixth, and D.C. Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney client privilege is lost. Cases from the Third and Sixth Circuits have held that disclosure destroys the privilege, even in the presence of a confidentiality agreement.

Cases permitting selective waiver

The court in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) adopted a selective waiver approach. Diversified Industries had conducted an internal investigation over a possible "slush fund" that may have been used to bribe purchasing agents of other corporations to buy its product. The Securities and Exchange Commission instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified's internal investigation. Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC's request. Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal. The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the attorney-client privilege was waived when privileged material was voluntarily disclosed to the SEC. The Eighth Circuit rejected this argument, holding that because the documents were disclosed in a "separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred." 572 F.2d at 611. The court explained, "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them. . . ." *Id.*

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. 368, 373 (D. Wis 1979), the court held that cooperation with federal agencies should be encouraged, and therefore refused to treat disclosure of privileged information to the SEC as a waiver of the corporation's attorney-client privilege. *See also In re LTV Sec. Litig.,* 89 F.R.D. 595, 605 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the

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[3]I am indebted to former UNC law student Mark Tolman, now an attorney with the firm Kilpatrick Stockton in Winston-Salem, N.C., for his excellent work on this portion of the memorandum.

client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents. . . ."

General rejection of selective waiver

In *United States v. Massachusetts Institute of Technology,* 129 F.3d 681 (1st Cir. 1997), the court held that the attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense. The documents had been voluntarily disclosed to the DOD pursuant to a regular audit. The same documents were sought as part of an IRS investigation. In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because "agencies usually have means to secure the information they need and, if not, can seek legislation from Congress." 129 F.3d at 685. The court added that applying the general principle of waiver of privilege to any third party disclosure "makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty." *Id.*

In *Permian Corp. v. United States,* 665 F.2d 1214 (D.C. Cir. 1981), Permian sought attorney-client protection for documents sought by the Department of Energy. The documents had previously been disclosed to the SEC. The court rejected the approach of the *Diversified* case and held that the privilege had been waived by the SEC disclosure. The court stated that "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship." 665 F.2d at 1221. The court added that the "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment." *Id.*

In *In re Weiss,* 596 F.2d 1185 (4th Cir. 1979), the court, distinguishing *Diversified* as involving a private litigation, held that a lawyer's testimony before the SEC constituted a waiver of the attorney-client privilege as to future testimony before a grand jury.

Rejection of selective waive even with a confidentiality agreement

Two prominent cases, from the Third and Sixth circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991), Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice in connection with investigations concerning the bribing of foreign officials. Westinghouse said that its disclosures to the SEC were made in reliance upon SEC

regulations that provided that "information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized." 951 F.2d at 1418, n. 4 citing 17 C.F.R. § 240.0-4 (1978). The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse's work product and attorney-client privileges. The Republic of the Philippines brought suit against Westinghouse alleging the bribing of former President Marcos to obtain a power plant contract. The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies. The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ. The court noted (951 F.2d at 1425):

> [S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. . . . Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified*. . . .
>
> The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto the attorney-client privilege. Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies. We agree with the D.C. Circuit that these objectives, however laudable, are beyond the intended purposes of the attorney-client privilege, see *Permian,* 665 F.2d at 1221, and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.

The court also noted that in 1984, Congress had rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency. 951 F.2d at 1425, citing *SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934,* in 16 Sec.Reg. & L.Rep. at 461 (March 2, 1984). A regulation to the same effect was proposed, but not adopted, in connection with the Sarbanes-Oxley Act. See proposed 17 C.F.R. § 205.3 (e)(3), http://www.sec.gov/rules/final/33-8185.htm (Viewed Oct. 5, 2005). The Commission indicated that the regulation, although included in the final draft of the regulations implementing Sarbanes-Oxley, was not adopted because of the Commission's concern about its authority to enact such a provision. In its final report, the Commission reiterated its position that there were strong policy reasons behind such a provision and

that, because of those policy reasons, it still intended to enter into confidentiality agreements. *Id.*

Relevant to the question of scope of waiver, the court in *Westinghouse* also held that the privilege is waived only as to those communications actually disclosed, "unless a partial waiver would be unfair to the party's adversary." *Id.* at 1426 n.12. If partial waiver disadvantages the adversary by allowing the disclosing party to present a one-sided story to the court, the privilege would be waived as to all communications on the same subject.

The court in *Westinghouse* distinguished between the attorney-client and work product privileges and stated that a disclosure to another party might not necessarily operate as a waiver of the work product privilege. Disclosures in aid of an attorney's preparation for litigation would still be protected. However, the court found that disclosure to the federal agencies in this instance did operate as a waiver, because the disclosures were not made to further the goal underlying the work product doctrine – the protection of the adversary process. *Id.* at 1429.

The court in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289 (6th Cir. 2002) also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement. In that case, the Department of Justice had conducted an investigation of possible Medicare and Medicaid fraud. Columbia/HCA had disclosed documents to the DOJ under an agreement with "stringent" confidentiality provisions. *Id.* Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals. These plaintiffs sought discovery of the materials disclosed to the DOJ. Columbia/HCA raised attorney-client and work product privilege objections. The court expressly rejected the application of selective waiver for either privilege under these circumstances. In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was "not a creature of contract, arranged between parties to suit the whim of the moment." *Id.* at 303. The court further reasoned that allowing federal agencies to enter into confidentiality agreements would be to allow those agencies to "assist in the obfuscating the truth-finding process." *Id.*

Recognition of selective waiver where a confidentiality agreement exists

A few courts have at least indicated that they would recognize selective waiver where there was an express reservation of confidentiality before disclosure.

The leading decision taking this position is *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). The court held in that case that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency "only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed." *Id.* at 646. The court noted:

> [A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.

In *In re Steinhardt Partners, L.P.,* 9 F.3d 230 (2d Cir. 1993), the court rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC that would otherwise have been protected as work product. However, after so holding, the court stated (*Id.* at 236):

> In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. . . . Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

See also Dellwood Farms, Inc. v Cargill,Inc., 128 F.3d 1122, 1127 (7th Cir. 1997) (claim of law enforcement privilege could have been maintained after government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *Fox v. Cal./Sierra Fin. Serv.,* 120 F.R.D. 520, 527 (N.D. Cal. 1988) (privilege lost "without steps to protect the privileged nature of such information;" follows *Teachers Insurance*); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 697 (D. Colo. 1993) (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party).

The need for a statute rather than a rule.

Much of the controversy surrounding the adoption of the Federal Rules of Evidence involved the proposed rules governing privileges. Perhaps as a reaction to that controversy, Congress not only deleted those rules from the rules ultimately adopted, it enacted a statute, 28 U.S.C. § 2074(b), providing that any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an act of Congress. Put otherwise, rules governing privilege cannot be enacted through the normal rulemaking process. *See* Kenneth S. Broun, *Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence,* 53 Hastings L. J. 769, 778 (2002).

There has been no case directly construing § 2074(b), largely because the judiciary has elected not to deal with privileges in face of the Congressional mandate. (*But see Baylson v. Disciplinary Bd. of the Supreme Court of Pa.,* 764 F. Supp. 328 (E.D. Pa. 1991) (28 U.S.C. §

2074(b) cited in the case considering the effect of a Pennsylvania Rule of Professional Conduct and its application to federal prosecutors).

An argument might be made that a rule governing the scope of waiver of privileges would not come within § 2074(b) because such a rule would not modify a privilege itself – only its effect after disclosure.

Nevertheless, probably the better argument is that change in the scope of waiver, the development of rules with regard to inadvertent waiver or a provision for selective waiver would all be modifications of privilege law and thus within the meaning of the statute. A statutory, rather than a rule, approach to the issue is the more prudent course.

The limitations on rule making with regard to waiver of privilege were recognized by the Committee on Rules of Practice and Procedure in its report submitting proposed amendments to the Federal Rules of Civil Procedure dealing with electronic discovery to the Judicial Conference. The Standing Committee noted the problems that privileged documents present in large volume document cases, especially in electronic discovery cases. However, its proposed amended rules deal only with a procedure for asserting privilege claims. The committee stated in its report (Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept., 2005, at 29):

> Because the proposed amendment only establishes a procedure for asserting privilege or work-product protection claims after production and does not attempt to change the rules that determine whether production waives the privilege or protection asserted, it does not trigger the special statutory process for adopting rules that modify privilege. By providing a clear procedure to allow the responding party to assert privilege after production, the amendment helpfully addresses the parties' burden of privilege review, which is particularly acute in electronic discovery.

Some possible statutes

Following are two models of statutes. The core of each model is taken from the language of Proposed Federal Rule 511 dealing with Waiver of Privilege by Voluntary Disclosure. The proposed statute is also intended to be consistent with § 79 of the Restatement the Law Governing Lawyers 3d (2000), which provides:

> The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication.

The models incorporate the fairness considerations discussed in the Marcus article as set forth above. No guidance is given as to what might constitute fairness under the circumstances. In that respect, the statutes are patterned on Fed. R. Evid. 106, which provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party 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.

Under Model 1, there is no waiver, even with regard to the disclosed document, for inadvertent disclosure, provided the privilege holder took reasonable precautions to prevent disclosure, took reasonably prompt measures to rectify the error, and, if applicable, adhered to the provisions of what is now Proposed Fed.R.Civ.P. 26(b)(5)(B), which set forth a procedure for retrieving privileged information disclosed during discovery. This treatment of inadvertent waiver is an attempt to incorporate the balancing test put forth in cases such as *Hartford Fire Insurance Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D. Cal. 1985), discussed above. The *Hartford Fire* case lists several factors. Model 1 sets out only two of those factors – the reasonableness of the precautions and the time taken to rectify the error. The statute could be reworked to add other factors, and the language could be amended to provide more predictability.

The word "inadvertent" is used in Model 1. Arguably, "unintended" or "mistaken" may be better terms. The word "inadvertent" is used because that is the word used in the cases. In addition, using "inadvertent" seems to avoid the argument that a document may be intentionally produced but without consideration of the implications of production on the question of privilege. "Intended or unintended" is used in Model 2 for the sake of parallelism and because the subtleties are not as significant where the mental state of the lawyer or client is made irrelevant to the issue.

The bracketed clause in part (b)(2) of Model 1 would limit the inadvertent waiver protection to discovery situations. The problems with inadvertent waiver have come largely in the context of discovery. The loophole may simply be too broad if not confined to discovery. There would seem to be no need for similar language in Model 2, where even inadvertent waiver constitutes a waiver with regard to the document in question. Just as in Model 1, the scope of the waiver is treated as a matter of fairness.

Model 2 specifically provides for waiver with regard to the documents disclosed, even if disclosure was inadvertent. Most of the concern by lawyers and judges involved in large document cases has to do with the scope of the waiver. Once a document is disclosed, it is difficult to put its contents back into the privileged domain. Under both of the drafted statutes, there would have to be a hearing as to the fairness of limiting disclosure to the document. Putting a balancing test in place for the document itself would cause one more issue to be resolved at a hearing and likely cause even more uncertainty.

Model 1 bracketed part (b)(3) and Model 2 bracketed part (b)(2) are identical and are intended to deal with the selective waiver issue. Both include alternative language that would require either a confidentiality agreement or simply that the disclosure be made in the course of a "nonpublic" investigation by the agency in question. The term "nonpublic" is taken from the *Diversified Industries* case, *supra,* 572 F.2d at 611. The draft language assumes that the ability to

waive selectively would apply only to agreements with governmental agencies, but that an agreement with a governmental agency at any level would qualify. The phrase "by or to" is used to cover situations such as involved in *Dellwood Farms, Inc. v. Cargill, Inc., supra,* where disclosure by a government agency was held to have waived the law enforcement privilege.

There is no alternative language set out that would take the position of cases such as *Westinghouse Electric,* which refuse to recognize selective waiver under any circumstances. If the drafters opt for that alternative, the bracketed selective waiver provision should be eliminated. The language of part (a), providing for waiver, would then govern, despite the circumstances of the earlier disclosure.

Part (d) of each model provides for a potentially binding effect of a court order on non-parties to the litigation. The language (together with the first clause of part (a)) recognizes specifically that the parties may want the court to tailor results in a particular case to their circumstances. The language of parts (a) and (d) gives the courts that flexibility and provides for greater assurance to the parties in the event that a non-party seeks to take advantage of a disclosure in other litigation.

Part (e) and the qualifying language in part (a) insure that the parties will continue to have the ability to create waiver rules different from those in the proposed rule even if not incorporated into a court order. The last clause of this subsection is intended to make sure that the agreement would not be binding on other parties unless incorporated into a court order. It would seem to be unfair to other parties to bind them to the terms of a private agreement.

There are other possible permutations of the statute. For example, the statute could be drafted to cover attorney-client privilege only. However, there are enough cases dealing with other privileges that it makes sense to deal with all privileged documents, not simply those covered by the attorney-client privilege.

ACT DEALING WITH WAIVER OF PRIVILEGE

MODEL 1

The Federal Rules of Evidence are amended to add a new Rule 502, providing as follows:

(a) Waiver of privilege. Unless provided otherwise by court order or by agreement between or among parties to litigation or by the terms of part (b), a person upon whom the law confers a privilege against disclosure of a confidential matter or communication waives the privilege if the privilege holder – or a predecessor while holder of the privilege – voluntarily discloses or consents to disclosure of any significant part of the matter or communication.

(b) Exceptions. A voluntary disclosure of a communication does not operate as a waiver of a privilege where

(1) the disclosure is itself a privileged communication, or

(2) the disclosure is inadvertent [and is made in the course of discovery in connection with ongoing litigation], provided the privilege holder took reasonable precautions to prevent disclosure and took reasonably prompt measures to rectify the error, including, if applicable, adherence to the procedures set forth in Fed. R. Civ. P. 26(b)(5)(B).

[(3) the prior disclosure is made by or to a federal, state, or local governmental agency [under an agreement that preserves the confidentiality of the communications disclosed.] [in the course of a nonpublic investigation by the agency by or to which the disclosure is made.]]

(c) Subject matter. Disclosure of a communication waives the privilege with regard to other communications dealing with the same subject matter where the other communications ought in fairness to be considered in connection with the disclosed communication. The privilege is not waived with regard to any other communications dealing with the same subject matter.

(d) Binding effect of court orders on non-parties. To the extent that the order so provides, an order entered in any matter to which these rules apply, concerning the existence or waiver of a privilege held or claimed by a party to the matter, governs the continuing existence of the privilege with regard to all persons or entities, whether or not they were parties to the matter.

(e) Party agreements. An agreement among the parties to litigation with regard to the effect of disclosure of a communication on privilege is binding on the parties without regard to the provisions of this rule, but not on other parties unless the agreement is incorporated into a court order as set forth in subsection (d).

MODEL 2

The Federal Rules of Evidence are amended to add a new Rule 502, providing as follows:

(a) Waiver of privilege. Unless provided otherwise by court order or by agreement between or among parties to litigation or by the terms of part (b), a person upon whom the law confers a privilege against disclosure of a confidential matter or communication waives the privilege if the privilege holder – or a predecessor while holder of the privilege – voluntarily discloses or consents to disclosure of any significant part of the matter or communication. The waiver operates whether the disclosure was intended or unintended.

(b) Exceptions. A voluntary disclosure of a communication does not operate as a waiver of a privilege where

(1) the disclosure is itself a privileged communication, or

[(2) the prior disclosure is made by or to a federal, state, or local governmental agency [under an agreement that preserves the confidentiality of the communications disclosed.] [in the course of a nonpublic investigation by the agency by or to which the disclosure is made.]]

(c) Subject matter. Disclosure of a communication waives the privilege with regard to other communications dealing with the same subject matter where the other communications ought in fairness to be considered in connection with the disclosed communication. The privilege is not waived with regard to any other communications dealing with the same subject matter.

(d) Binding effect of court orders on non-parties. To the extent that the order so provides, an order entered in any matter to which these rules apply, concerning the existence or waiver of a privilege held or claimed by a party to the matter, governs the continuing existence of the privilege with regard to all persons or entities, whether or not they were parties to the matter.

(e) Party agreements. An agreement among the parties to litigation with regard to the effect of disclosure of a communication on privilege is binding on the parties without regard to the provisions of this rule, but not on other parties unless the agreement is incorporated into a court order as set forth in subsection (d).

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 14th, 2005

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 14th 2005 in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Joan N. Ericksen
Hon. Robert L. Hinkel
Hon. Andrew D. Hurwitz
Thomas W. Hillier, Esq.
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. David Trager, Liaison from the Criminal Rules Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Timothy K. Dole, Esq., Rules Committee Support Office
Jeffrey N. Barr, Esq., Rules Committee Support Office
Tim Reagan, Esq., Liaison from Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Ronald Tenpas, Esq., Department of Justice
Roger Pauley, Esq., former Committee member

Opening Business

Judge Smith welcomed the new members of the Committee, Judge Anderson and Judge Ericksen. Judge Smith and Judge Levi reported on the actions taken on the proposed amendments to Rules 404, 408, 606(b) and 609. Those rules were approved by the Judicial Conference and are being referred to the Supreme Court.

Judge Smith asked for approval of the minutes of the April 2005 Committee meeting. The minutes were approved.

Privileges

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of privilege. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there was a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made less expensive. Other concerns include the problem that arises if a corporation cooperates with a government investigation by turning over a privileged report. Most federal courts have held that this disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This is a problem because it can deter corporations from cooperating in the first place.

At the November 2005 Committee meeting, Professor Broun presented for the Committee's consideration a draft statute that would provide the following:

1. Inadvertent disclosures would not constitute a waiver so long as the producing party acted reasonably in trying to maintain the privilege and promptly sought return of the privileged material.

2. Disclosure of privileged information to a government agency would not constitute a waiver for all purposes, so long as the producing party and the government entered into a confidentiality agreement.

3. A waiver of privilege would cover only the information disclosed, unless fairness required a broader subject matter waiver.

4. A court could enter an order protecting against the consequences of waiver in a case, and such an order would be binding on third parties.

5. Parties could enter into agreements protecting against the consequences of waiver in a case, but those agreements would not bind third parties unless they were incorporated into a court order.

Professor Broun explained that the proposal was in the form of a statute because the Enabling Act does not permit the Judicial Conference to amend rules on privilege directly. Rules of privilege must be directly enacted by Congress.

The Committee first unanimously determined that a proposed rule change covering waiver of privileges was important, timely and necessary, and that the Committee should work toward finalizing such a proposal. The Committee then discussed how a waiver rule might be enacted. One suggestion was that the proposal could be sent to Congress by the Judicial Conference as a piece of suggested legislation. Under this suggestion, the ordinary time periods and constraints of the rulemaking process would not be applicable, but the Standing Committee could provide a period of public comment before the proposal would be referred to the Judicial Conference as an action item. Another suggestion was to seek legislation from Congress that would provide an exception to the Enabling Act limitation on rules of privilege; this amendment would allow the Judicial Conference to use the regular rulemaking process to establish a rule on waiver of privileges. Judge Levi, Chair of the Standing Committee, promised to take these two suggestions under advisement. The Committee resolved to revisit this procedural question at its next meeting.

The Committee then discussed the text of the proposal. A number of considerations were raised and discussed concerning, among other things, the breadth of the rule; its impact on state courts, if any; the relationship between the private ordering provisions of the rule and the default rules governing inadvertent disclosure and selective waiver; the impact of the rule on the work product immunity; how the rule would apply to protections in other rules that are not labeled "privileges", such as Criminal Rule 16; whether the rule could be applied so broadly as to protect against use of disclosures made voluntarily to police officers or the grand jury; whether the rule should be limited to the context of discovery; and how the rule should be drafted to make clear that it is not intended to and does not cover the question of waiver of a Fifth Amendment privilege.

Professor Broun agreed to take all these questions and suggestions and redraft the proposed waiver rule for consideration at the next meeting. He will also consider whether it is necessary or advisable to propose not only a waiver rule for the Evidence Rules, but also a parallel statute applying the same waiver standards to state court actions. The binding of state courts is important because otherwise parties cannot structure their conduct in reliance on the federal rule protecting against waivers. The Committee agreed, however, that any rule purporting to bind state courts to a waiver rule would have to come through a statute located outside the Federal Rules of Evidence, as the Federal Rules by definition limit their applicability to federal proceedings.

Crawford v. Washington

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial", its admission against the defendant violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. The Court in *Crawford* declined to define the term "testimonial" and also declined to establish a test for the admissibility of hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The memorandum prepared by the Reporter indicated that the federal courts are in substantial agreement that certain hearsay statements are always testimonial and certain others are not. Those considered testimonial include grand jury statements, statements made during police interrogations, prior testimony, and guilty plea allocutions. Statements uniformly considered nontestimonial include informal statements made to friends, statements made solely for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. In contrast, courts are in dispute about whether 911 calls and statements made to responding officers are testimonial. The Reporter noted that the Supreme Court has granted certiorari in two state cases to determine whether 911 calls and statements made to responding officers are testimonial within the meaning of *Crawford.*

One concern after *Crawford* was whether it invalidated Rules such as 803(6), 803(10) and 902(11) and (12), all of which permit proof by affidavit to authenticate records or, in the case of 803(10), the non-existence of a public record. The Reporter noted that the federal courts to this point has declared that *Crawford* does not bar the use of these kinds of affidavits as they are not considered testimonial.

The Reporter was directed to monitor developments in the case law and to prepare an updated report on post-*Crawford* case law for the next Committee meeting.

Rule 804(b)(3)

The Committee considered a memorandum by the Reporter on whether it should revive its proposal to amend Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest. The Committee's previous proposal was approved by the Judicial Conference, but the Supreme Court remanded it for reconsideration in light of the intervening decision in *Crawford*. The Reporter's memorandum revised the previously proposed amendment to address some of the concerns about testimonial evidence raised in *Crawford*. The Committee considered the revised proposal and determined that it should not be adopted at this point, as further time was necessary

to determine the meaning and application of *Crawford.* Deferring the proposal was especially prudent because, after the Reporter's memorandum was prepared, the Supreme Court granted certiorari in two cases to determine the correct scope of the term "testimonial", the definition of which was left open in *Crawford.* As such there is a risk that an amendment attempting to exclude testimonial hearsay offered under Rule 804(b)(3) might not be congruent with the Supreme Court's definition of the term "testimonial." Moreover, one reason to propose the amendment would be to assure that non-testimonial declarations against penal interest offered by the prosecution would comply with the reliability requirements of the Supreme Court decision in *Roberts v. Ohio.* But while all courts after *Crawford* have held that those reliability requirements remain applicable to non-testimonial hearsay, the Supreme Court has yet to resolve this question. Therefore any amendment to Rule 804(b)(3) to bring it into compliance with *Roberts* might be premature.

While the Committee decided not to propose an amendment to Rule 804(b)(3) at this time, members did express concern that hearsay statements admitted under some of the Federal Rules exceptions would violate the right to confrontation after *Crawford.* Examples include certain excited utterances, declarations against penal interest, and possibly certain statements for purposes of medical treatment. The Evidence Rules Committee has long taken the position that rules should be amended if they are subject to unconstitutional application; otherwise the rules become a trap for the unwary, as counsel may not make a constitutional objection under the assumption that the rules would never allow admission of evidence that violated a party's constitutional rights.

Committee members determined that it would not make sense to try to define in the rules all of the possible hearsay statements that might be constitutionally problematic after *Crawford*—especially because *Crawford* remains a moving target and certiorari has been granted on two *Crawford* cases. Committee members concluded, however, that a generic reference to constitutional requirements might usefully be placed either in the hearsay rule itself (Rule 802), or before each of the rules providing exceptions that might be problematic after *Crawford* (Rules 801(d)(2), 803, 804 and 807. Such a generic reference does not run the risk of being inconsistent with the Supreme Court's subsequent interpretations of the Confrontation Clause. The Reporter noted that there is precedent for such generic constitutional language in the Evidence Rules: Rule 412 provides that evidence must be admitted (despite the exclusionary language in the Rule) where exclusion would violate the constitutional right of the accused.

The Committee directed the Reporter to prepare an amendment that would provide a basic reference to the constitutional rights of the accused with regard to admission of hearsay under the Federal Rules hearsay exceptions. The Reporter stated that he would prepare one model that would be an amendment to Rule 802, the hearsay rule itself, and another model that would amend the hearsay exceptions by providing a reference to the constitutional rights of the accused at the beginning of Rules 801(d)(1)(2), 803, 804 and 807. The Committee agreed to consider these models at the next meeting.

Electronic Evidence

The Reporter prepared a memorandum proposing consideration of an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposal was to add a new Rule 107 that would provide as follows:

> *Evidence in Electronic Form.* As used in these rules, the terms "written," "writing," "record," "recording," "report," "document," "memorandum," "certificate," "data compilation," "publication," "printed material," and "material that is published" include information in electronic form. Any "certification" or "signature" required by these rules may be made electronically.

The Reporter noted that the courts are not having much trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. Courts have been using basic evidentiary standards—relevance, reliability, prejudice, accuracy, authenticity—to determine the admissibility of electronic evidence. The Reporter stated that the goal of the proposal was not to change or affect any of the current evidentiary standards being applied to electronic evidence. Rather the goal was simply to bring the language of the Evidence Rules up to date with technological changes.

After discussion, the Committee agreed that the amendment would be a good addition to the Evidence Rules, but members also noted that there was no pressing need to proceed immediately on the amendment. The Committee resolved to adhere to its practice of proposing amendments as a package where possible, thus avoiding yearly changes to the Evidence Rules. The proposed amendment was tentatively approved as part of any package of amendments that the Committee might propose in the future. Some Committee members expressed concern that the amendment might lead to admission of electronic information that is not properly authenticated. The Reporter was directed to research whether the proposed amendment might lead to that result, and to revise the proposal to avoid any such problem.

The meeting was adjourned, with the time and place of the Spring 2006 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter

MEMORANDUM

DATE: December 9, 2005

TO: Judge Mark R. Kravitz
Time-Computation Subcommittee
Advisory Committee Reporters
John K. Rabiej

FROM: Patrick J. Schiltz

RE: Revised Time-Computation Template

Prof. Edward H. Cooper, the Reporter to the Civil Rules Committee, will not be able to participate in our December 14 conference call. Ed and I have discussed the time-computation template at length, though, and he made several very helpful comments. Ed's suggestions include the following:

1. Ed agrees with the Subcommittee's decision that, when the final day of a backward-looking deadline falls on a Saturday, the paper should be due on the Friday before that Saturday, not on the Monday following that Saturday. But Ed expresses the "wish to find some better way to express in rule language the idea so clearly expressed in the Note — 'one should continue counting in the same direction.'" Ed explains: "I fear many readers will not find that direction clear in looking for 'the next day.' Many people think that Sunday is the next day after Saturday." Ed suggests that we "simply . . . transport the Note expression into rule text: 'the period continues to run in the same direction until the end of the next day that is not a Saturday, [etc.].'" Ed argues that this clarification "seems better than trying to come up with some complex combination that talks about the day after a forward-running period and the day before a backward-running period." I agree with Ed, and the revised template reflects his suggestion.

2. Ed objects that it is "misleading" for the Committee Note to say, with respect to backward-looking deadlines, that "one should continue counting in the same direction, *so that no time period is shortened.*" Ed argues: "The time available to the person doing the act is shortened; the argument that this is not really a 'period,' but a space or interval before the deadline set by the period, does not dispel the potential confusion." He suggests deleting the italicized words.

I do not find the language misleading. Throughout the rule and the Committee Note, it is clear that "period" refers to a deadline set in the rules — the 10 days after 'x' or the 10 days before 'y.' The words to which Ed objects merely reinforce and justify the "same direction" rule: That rule ensures that a deadline provided in a statute, rule, or order will never contain fewer real

days than stated days. That said, I do not feel strongly, and I can easily delete the italicized words from the template if the Subcommittee shares Ed's concern.

3. Ed was made nervous by the final paragraph in the Committee Note to subdivision (a)(1). He tells me that "[t]he reconsideration of Civil Rules time periods will include all of the 10-day and shorter periods, but it will also include all periods longer than 10 days. Changes — up or down — may be made for reasons that have nothing to do with eliminating the 'intervening Saturdays, etc.' gimmick." In the revised template, I have rewritten this paragraph along lines suggested by Ed, putting in brackets a sentence that may not be needed by all of the advisory committees.

4. Ed writes: "Subdivision (a)(2) does not say anything about *starting* an hour count at the moment of the event that triggers the period. Since (a)(1)(A) excludes the opening day from a period expressed in days, the implication seems reasonably clear — the opening hour is not excluded. But might it be better to state this in rule text: 'When the period is stated in hours, the period begins with the event that starts [it]{the period}, and if the period ends at a time * * * .'"

This occurred to me while drafting the template, and I went back and forth on whether the rule itself should provide that a deadline stated in hours begins to run immediately on the occurrence of the act, event, or default that triggers the deadline. I eventually opted to address the issue in the Committee Note. I generally like to avoid stating the obvious in the text of rules, both to save words (this provision is already quite long), and to avoid confusing readers by causing them to wonder about the omission of other obvious things. I just could not imagine a reasonable reader believing that a 24-hour deadline that is triggered by an order entered at 2:00 p.m. on Wednesday starts running at any time other than 2:00 p.m. on Wednesday. If the Subcommittee disagrees, we can easily add language to the text of subdivision (a)(2).

Ed also made a couple of helpful stylistic suggestions, which I have incorporated in the revised template. I look forward to talking with you on December 14.

Rule 6. Computing and Extending Time

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

(1) ***Period Stated in Days.*** When the period is stated in days:

(A) *Day of the Event Excluded.* Exclude the day of the act, event, or default that begins the period.

(B) *Last Day Included.* Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period continues to runs in the same direction until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(2) ***Period Stated in Hours.*** When the period is stated in hours, and the period ends at a time on a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible, the period continues to runs in the same direction until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) ***"Legal Holiday" Defined.*** ~~As used in these rules,~~ "Llegal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence

Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period needs to be computed. If, for example, a rule or order explicitly requires that a paper be filed "no later than November 1, 2006," then the paper is due on November 1, 2006. But if a rule or order requires that a paper be filed "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days.

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of 10 days or less. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. (When the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.) Thus, a paper that must be filed within 10 days after the entry of an order on Tuesday, August 22, 2006, is due on Friday, September 1, 2006. But a paper that must be filed within 10 days after the entry of an order on Wednesday, August 23, 2006, is not due

until Tuesday, September 5, 2006 (the day following Labor Day) because day 10 is a Saturday and Monday is Labor Day.

In determining what is the "next" day for purposes of subdivision (a)(1)(B) (as well as for purposes of subdivision (a)(2)), one should continue counting in the same direction, so that no time period is shortened. If, for example, a paper is due 10 days *after* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Monday, March 17. But if a paper is due 10 days *before* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Friday, March 14.

~~Because intermediate Saturdays, Sundays, and legal holidays will now be counted in computing all periods of time, deadlines of 10 or fewer days have been shortened as a practical matter. To compensate, the Federal Rules of Civil Procedure have been amended to extend a number of those deadlines. See, e.g., [CITE].~~ Periods previously expressed as 10 days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., Rules __. [Other time periods have been reviewed as well, leading to many other changes.]

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, see, e.g., 28 U.S.C. § 3771(d)(3), as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:00 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:00 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. (Again, when the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.)

Subdivision (a)(3). New subdivision (a)(3) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

MEMORANDUM

DATE: September 8, 2005

TO: Time-Computation Subcommittee **CC:** John K. Rabiej

FROM: Judge Mark R. Kravitz

RE: Time-Computation Project

Thank you for agreeing to serve on the Time-Computation Subcommittee, which has been appointed by Judge David Levi and charged with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. I have been asked to chair the Subcommittee, and Prof. Patrick Schiltz, the Reporter to the Advisory Committee on Appellate Rules, has been asked to serve as the Subcommittee's reporter. The Subcommittee's main task, as I understand it, is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within 8 days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than 7 days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A) should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. Attached

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[1]*See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

please find a list of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules, and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz, who put together this list, has also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit the attention of the Subcommittee.

John Rabiej from the Administrative Office will soon be contacting you to set up a teleconference for late September or early October. At that teleconference, I hope to get tentative agreement on how the issues identified by Prof. Schiltz should be resolved. Prof. Schiltz will then draft a template that reflects our agreement, and we will hopefully be able to review and approve that draft template before the Standing Committee meets in January. The template will then go to the advisory committees in time for their spring meetings, and, following those meetings, this Subcommittee will review any concerns raised by the Standing Committee or any of the advisory committees, and the advisory committees will begin work on reviewing their deadlines. The tentative plan for the time-computation project is thus as follows:

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Summer 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

As you review the attachment, please let me know if you believe that we have missed any topics that might be addressed by the Subcommittee. Also, please feel free to share by e-mail any comments that you have on the issues identified by Prof. Schiltz. We certainly do not have to wait until the teleconference to begin our discussion.

Thank you for your assistance with this project.

I. SCOPE OF TIME-COMPUTATION RULES

A. Appellate Rule

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 . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . .

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . .

D. Criminal Rule

Rule 45. Computing and Extending Time

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

E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the Subcommittee may want to address this inconsistency.

II. EXCLUDING DAY OF EVENT

A. Appellate Rule

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:

(1) Exclude the day of the act, event, or default that begins the period.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

D. Criminal Rule

Rule 45. Computing and Extending Time

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

(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only "restyling" to make the language consistent may be needed.

III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

A. Appellate Rule

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:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is

less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

D. Criminal Rule

Rule 45. Computing and Extending Time

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

* * * * *

(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

E. Comment

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of "calendar days." (More about calendar days below.)

The "11-day rule" (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.[3] The Subcommittee should consider eliminating the 11-day rule and providing instead that "days are days" — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A "days are days" rule would also moot the

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[3] If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005). Ed Cooper points out that a 10-day deadline can actually extend to 17 days, if it begins running on a Friday, December 22.

inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

IV. CALENDAR DAYS

A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of "calendar days." Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then "days are days," and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."

In addition, Appellate Rule 26(c) — the "3-day rule" (discussed below) — is stated in calendar days: "When 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." (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in "days.")

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days." And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal "by third-party commercial carrier for delivery within 3 calendar days."

B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

C. Civil Rule

The Civil Rules do not refer to calendar days.

D. Criminal Rule

The Criminal Rules do not refer to calendar days.

E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if "days were days" — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the Subcommittee to consider eliminating the 11-day rule.

V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

A. Appellate Rule

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:

* * * * *

(3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

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

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . . When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday . . . .

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only "restyling" to make the language consistent may be needed.

VI. LAST DAY OF PERIOD ON DAY CLERK'S OFFICE INACCESSIBLE

A. Appellate Rule

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:

* * * * *

(3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk's office inaccessible.

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

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

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a . . . day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the Subcommittee may wish to address it.

The Subcommittee may also wish to consider whether to address the myriad problems that will arise as electronic filing becomes pervasive. For example, suppose that the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system? Or because of problems with the filing attorney's or party's computer system? Or suppose the opposite: The clerk's office is physically closed, but electronic filing is possible 24 hours per day, 365 days per year. Should the rules provide that a paper that is filed electronically at 11:59 p.m. on the last day of a deadline is timely, even though it was filed after clerk's office had closed?

My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility. It may be that attempting to address these issues now would be premature, and that we should instead give courts and local rulemakers a few years to identify the issues that electronic filing will present and experiment with various means of addressing those issues.

VII. DEFINITION OF "LEGAL HOLIDAY"

A. Appellate Rule

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, 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.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

D. Criminal Rule

Rule 45. Computing and Extending Time

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

* * * * *

(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(i) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

(ix) Thanksgiving Day;

(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

E. Comment

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

A. Appellate Rule

Rule 26. Computing and Extending Time

* * * * *

(c) **Additional Time after Service.** When 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. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

B. Bankruptcy Rule

Rule 9006. Time

* * * * *

(f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

C. Civil Rule

Rule 6. Time

* * * * *

(e) ADDITIONAL TIME AFTER SERVICE UNDER RULE 5(b)(2)(B), (C), OR (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

D. Criminal Rule

Rule 45. Computing and Extending Time

* * * * *

(c) **Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules[4] and the Criminal Rules[5]). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The Subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, "days are days." The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the Subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives already exist under the present rule. For example, a party might opt for mail rather than electronic service because,

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[4]*See* FED. R. BANKR. P. 7005.

[5]*See* FED. R. CRIM. P. 49(b).

although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals "take up and decide" the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The Subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

B. "Backward-looking" deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing." If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The Subcommittee may want to consider proposing template language that would address this issue.

C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would reduce the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem altogether (parties can be served on — and thus deadlines can run from — a Saturday or Sunday), nor reduce the problem of deadlines ending on legal holidays.

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 19, 2005

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2005 LONG-RANGE PLANNING MEETING

The September 19, 2005 long-range planning meeting was held in Washington, D.C. It was facilitated by Chief Judge Michael Boudin, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by the Executive Committee and chairs of 15 Judicial Conference committees and Judge Robert Gleeson, incoming chair of the Committee on Defender Services. Administrative Office participants included Director Leonidas Ralph Mecham, Associate Director Clarence A. Lee, Jr., Deputy Associate Director Cathy A. McCarthy, and Long-Range Planning Officer William M. Lucianovic, who provide principal staff support for the long-range planning process, and others. A list of participants is included as Appendix A.

Budget and Cost-Containment Issues

Judge Julia Smith Gibbons, chair of the Committee on the Budget, stated that the judiciary is taking a correct two-pronged approach to securing its financial health. It includes congressional outreach to secure adequate funding to meet judiciary resource requirements and continued implementation of the judiciary's cost-containment strategy. She emphasized the importance of the cost-containment initiatives to prevent a future financial crisis.

While the judiciary fared better than was feared in FY 2005, and the outlook for FY 2006 is relatively favorable, Judge Gibbons cautioned not to draw the conclusion that the judiciary's budget problems are over because there is little doubt that the judiciary will face difficulties in obtaining needed funding in the future. Updated long-term projections show a growing gap between expected funding levels and projected requirements (see Appendix B).

If the judiciary receives only 3 percent increases in appropriations after FY 2006, without additional cost-containment measures, the potential shortfall between requirements and funding in the Salaries and Expenses account would grow to $1.3 billion by FY 2015. Even if the judiciary were to receive 4.5 percent annual increases (the average appropriations increase between FY 2004 and FY 2005), there would be a sizeable gap every year, culminating in a shortfall of $533 million by FY 2015. Most of the future cost growth is for salaries and benefits of staff and judges, followed by rent increases. Essentially, although the more favorable scenario would provide more time to address costs, it would not eliminate future shortfalls. Judge Gibbons emphasized that under any likely scenario, cost containment will continue to be a very important component in the judiciary's budget strategy for the future.

Judge Robert C. Broomfield, chair of the Budget Committee's Economy Subcommittee, remarked that the committee chairs are doing a "fantastic job" in their attention to the entirety of the judiciary's fiscal problems over and above the needs of any particular committee. Judge Broomfield expressed the Budget Committee's appreciation for their efforts, but noted that the situation might get worse before it gets better, since Hurricane Katrina recovery efforts will probably influence federal spending for at least the immediate future. Administrative Office Director Leonidas Ralph Mecham pointed out that even though the judiciary accounts for only 0.2 percent of federal spending, he too is concerned that the judiciary's appropriations next year will be subject to budget cuts designed to offset spending for disaster recovery.

Study on Administrative Services

Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management, noted that the Study on Administrative Services is one of a number of initiatives undertaken in the past several years to increase efficiency in the courts and create opportunities for savings. Assistant Director Noel Augustyn reported on the Study on Administrative Services, recently completed by IBM in concert with the Urban Institute and National Center for State Courts.

IBM's report shows the total costs of administrative services in the judiciary, describes administrative service delivery models used in the public and private sectors, and makes broad-scale recommendations with regard to approaches to administrative services delivery. Primary results of the study were:

- In FY 2004, the judiciary spent approximately $523 million for the administrative service areas of human resources, budgeting and finance, information technology, contracts and procurement, space and facilities, training and property management.

- Average costs of delivering administrative services, on a per-FTE-served basis, vary widely across court units, and less than 30% of this variation could be statistically explained by differences in unit staff size, unit salary levels, and office structure.

- Organizations and agencies in the public and private sectors increasingly have created shared service centers or outsourced administrative services, and they have realized substantial savings in doing so.

Mr. Augustyn noted that comments will be accepted until November 15, and his office has received to date about 50 comments from the courts, including district and

bankruptcy judges. The primary issues raised include: the need for additional research on recommended alternatives; the need to account for the quality of services provided; concern about the potential loss of local decision-making; and concerns about the applicability of IBM's recommendations to the unique environment of the federal judiciary. The AO's advisory groups will discuss the report at the upcoming meetings, and the Conference committees will discuss the subject at their winter meetings.

Chief Judge Carolyn Dineen Judge King, chair of the Executive Committee, stated that there are too many people providing administrative services in the courts, including her own. There is also fierce resistance to change. She noted that despite resistance, courts should take a positive view toward administrative sharing. Every dollar spent on administrative services is a dollar that cannot be spent on operations, and by reducing the number of staff performing certain functions, courts can lower the risk of people getting into trouble. Judge Lungstrum commented that the CACM Committee has recognized this potential problem and has encouraged courts to consider sharing services locally. This has met with success in a number of places.

Compensation Study

Judge W. Royal Furgeson, chair of the Committee on Judicial Resources, along with Elliot Susseles, Senior Vice President of The Segal Company, reported on the compensation study underway. Judge Furgeson emphasized that its purpose is not to cut current pay or staffing levels but to look for long-term savings in the judiciary's compensation costs.

Even without a cost-containment purpose, an assessment of the judiciary's pay systems is necessary because these systems are linked to executive branch pay systems, which will be modified over the next few years. For example, the Working for America Act of 2005, if enacted, would bring about the sunset of the General Schedule (the basis of the judiciary's pay) by 2010.

The study is currently in its second of three phases. Phase 1 of the study examined the cost drivers of court compensation from 1998 to 2004. The data show that overall growth of the judiciary's compensation costs was generally consistent with executive branch agencies at an annual average growth of slightly over 6 percent per year. Similar growth is unlikely to be sustainable in the future.

Phase 2 of the study involves more data collection from employees and appointing officers to ascertain what factors are most important for attracting and retaining an excellent work force. Also, data grounded on job functions and skills will be used to

conduct a market study of external but related compensation systems. Phase 2 will conclude in August 2006, with recommendations and suggestions for the future.

Phase 3 will involve designing and implementing new compensation policies and systems approved by the Judicial Conference.

The next long-range planning meeting of committee chairs is scheduled for March 13, 2006. Suggestions for possible topics of interest for the next meeting should be sent to Cathy McCarthy.

Appendix A: Participants in the September 2005 Long-Range Planning Meeting

Committee Representatives	**Administrative Office Staff**
Planning Coordinator, Executive Committee	
Hon. Michael Boudin	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee	
Hon. Carolyn Dineen King, Chair Hon. Joel M. Flaum Hon. J. Owen Forrester Hon. Thomas F. Hogan Hon. David L. Russell Hon. John M. Walker, Jr. Leonidas Ralph Mecham, Director of the Administrative Office	Jeffrey A. Hennemuth Helen G. Bornstein Ellen Gerdes
Committee on the Administrative Office	
Hon. Robert B. Kugler, Chair	Cathy A. McCarthy
Committee on the Administration of the Bankruptcy System	
Hon. Marjorie O. Rendell, Chair	Francis F. Szczebak Ralph Avery Kevin Gallagher Richard Goodier
Committee on the Budget	
Hon. Julia Smith Gibbons, Chair Hon. Robert C. Broomfield	George H. Schafer James R. Baugher Michael V. (Mickey) Bork
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. Sim Lake, Chair	John M. Hughes Kim M. Whatley

Committee on Defender Services	Theodore A. Lidz
Hon. Patti B. Saris, Chair	Steven G. Asin
Hon. Robert Gleeson, Incoming Chair	Richard A. Wolff
Committee on Federal-State Jurisdiction	
Hon. Howard D. McKibben, Chair	
Committee on Information Technology	
Hon. James Robertson, Chair	Melvin J. Bryson
	Penny White
Committee on Intercircuit Assignments	
Hon. Royce C. Lamberth, Chair	Patrick Walker
Committee on the Judicial Branch	
Hon. D. Brock Hornby, Chair	Steven Tevlowitz
Committee on Judicial Resources	
Hon. W. Royal Furgeson, Jr., Chair	Charlotte G. Peddicord
	H. Allen Brown
	William P. Ard
Committee on Judicial Security	
(effective October 1, 2005)	Ross Eisenman
Hon. David Bryan Sentelle, Incoming Chair	Melanie F. Gilbert
	Linda Holz
Committee on the Administration of the Magistrate Judges System	
Hon. Nina Gershon, Chair	Thomas C. Hnatowski
	Charles E. Six
Committee on Rules of Practice and Procedure	
Hon. David F. Levi, Chair	Peter G. McCabe
	John Rabiej
Committee on Security and Facilities	
Hon. Jane R. Roth, Chair	Ross Eisenman
	Melanie F. Gilbert
	Linda Holz

Other Administrative Office staff in attendance:

Glen K. Palman	Steven G. Gallagher	E. Pepper van Noppen
Nancy Ward	Leeann R. Yufanyi	
Peggy Irving	Sandra J. Reese	
Edward M. Templeman	Fred Russillo	
William Moran	Elizabeth A. McGrath	

Appendix B: Long-Range Budget Forecasts

The judiciary's two-pronged approach – congressional outreach to obtain additional funds from Congress, and the full implementation of the judiciary's cost-containment strategy – continues to be critical to solving the judiciary's long-term budget problems and ensuring the financial health of the Third Branch.

The Administrative Office estimated the current gap between forecasted requirements and projected available funding in the Salaries and Expenses account. Two scenarios were developed, starting with an estimated 5.4 percent appropriation increase in fiscal year 2006[1]:

1. Assuming 3 percent annual funding increases, by 2009, the estimated shortfall will be about $399 million (7.8 percent below projected requirements). By 2015, the shortfall could be $1.3 billion (18.6 percent below requirements). (See upper line on Figure 1 on the next page.)

2. Assuming a 4.5[2] percent annual appropriations increases, by 2009, the estimated shortfall will be about $189 million (3.7 percent below projected requirements), and $533 million (7.3 percent below requirements) in fiscal year 2015. (See lower line on Figure 1.)

While the judiciary's appropriation outlook for fiscal year 2006 has improved, there is concern about the future. Both scenarios show a growing gap between funding and requirements. The higher appropriation scenario still signifies a serious financial shortfall in the not-too-distant future. This scenario buys the judiciary time to implement more fully cost-containment strategies with an aim to reducing potential outyear shortfalls to more manageable levels.

By fiscal year 2015, requirements for the Salaries and Expenses Account are expected to increase $2.3 billion (33 percent) over the fiscal year 2007 budget request.

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[1] The 5.4 percent estimate may be optimistic because the construction of a final budget is now complicated greatly by disaster-recovery expenses. There will likely be an attempt in Congress to rein in spending to help lower the growing deficit, to the possible detriment of the judiciary.

[2] This represents the average appropriation increase between FY 2004 and FY 2005.

Figure 1. Estimated Gap Between Available Funding and Requirements in the Salaries and Expenses Account Based on Two Possible Funding Scenarios

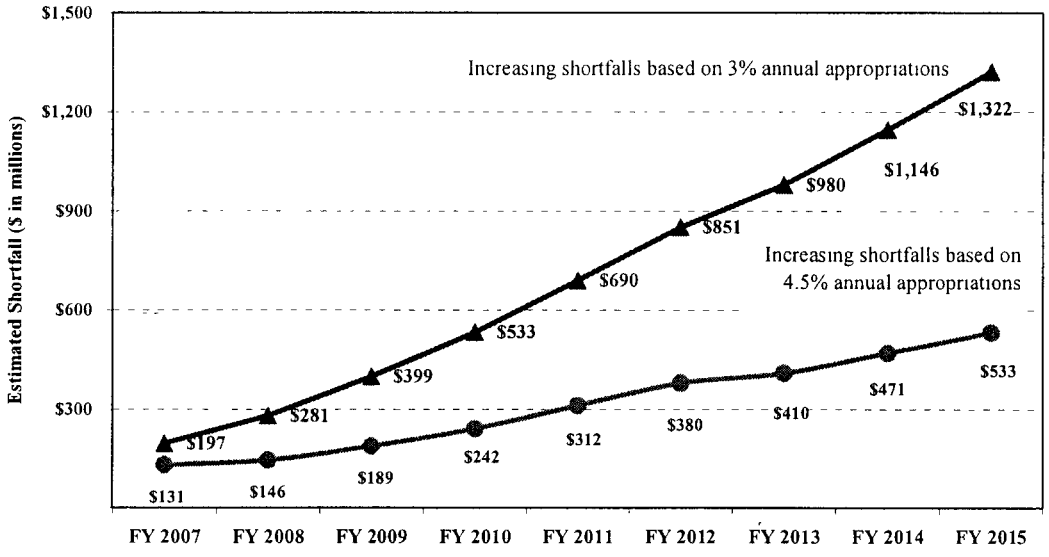
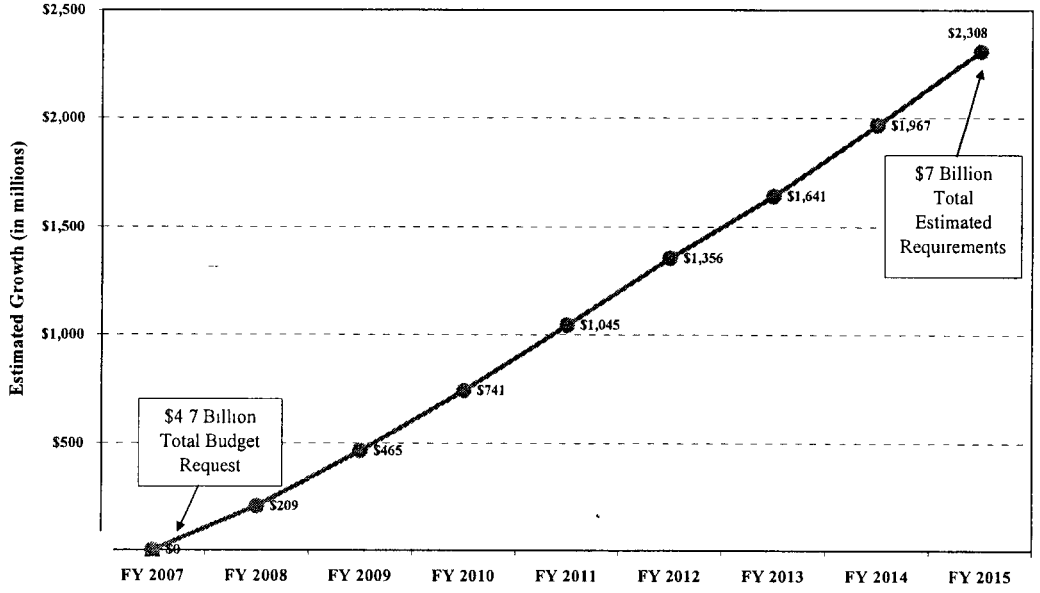


Figure 2. Projected Growth in Total Salaries and Expenses Requirements over Fiscal Year 2007 FY 2007-FY 2015



The scenarios are based on the following assumptions:

- Workload forecasts that indicate:

  - ✓ a 3.3 percent drop in courts of appeals filings from 62,762 in fiscal year 2004 to 60,600 in fiscal year 2015;
  - ✓ a 7.6 percent drop in district court filings from 352,360 in fiscal year 2004 to 325,600 in fiscal year 2015;
  - ✓ a 20.5 percent increase in the number of defendants filed in U.S. District Courts from 93,349 in fiscal year 2004 to 112,500 in fiscal year 2015;
  - ✓ a 3.6 percent increase in bankruptcy court filings from 1.62 million in fiscal year 2004 to 1.68 million in fiscal year 2015 (not accounting for the impact of bankruptcy reform legislation);
  - ✓ a 22.8 percent increase in probation supervision cases from 161,107 in fiscal year 2004 to 208,800 in fiscal year 2015; and
  - ✓ a 17.4 percent increase in the number of pretrial services investigations from 98,152 in fiscal year 2004 to115,200 in fiscal year 2015.

- Certain cost-containment initiatives adopted by the Judicial Conference in September 2004 as part of the overall cost-containment strategy:

  - ✓ continued 2 percent productivity adjustment for court support staff through fiscal year 2009;
  - ✓ deferrals in space-related costs related to the moratoria on courthouse construction projects, new prospectus-level repair and alteration projects, and non-prospectus space requests, which expire in 2006;
  - ✓ policy changes in probation and pretrial services offices that reduce certain work requirements; and
  - ✓ increased and new fees.

- Court support staffing requirements are based on the current staffing formulas.

- A pay factor of 2.6 percent was used for annual pay increases for fiscal year 2007 through 2015, and 2.0 percent annual non-pay inflationary increases.

- Information technology requirements are based on the latest set of long-range budget estimates endorsed by the Information Technology Committee.

- The space estimates include an annual inflationary increase of 3.1 percent, and the addition of new space based on expected delivery dates from the General Services Administration (GSA).

Not included in the estimates are:

- The cost of additional judgeships and courthouse construction projects approved by the Judicial Conference, but not yet authorized by Congress. This includes 56 Article III and 14 bankruptcy judgeships. If Congress authorizes these judgeships and court construction projects, the projected shortfall would grow by $100.3 million in fiscal year 2009 and by $132.7 million in fiscal year 2015.

- Potential savings resulting from the judiciary's efforts to obtain a partial rent exemption, or other rent relief.

- Staffing formulas for district and bankruptcy courts, reflecting CM/ECF and business process improvements, to be implemented in the fiscal year 2007 financial plan and the fiscal year 2008 budget formulation process.

- Potential cost avoidance and savings from cost-containment initiatives that are in progress, including:

  - ✓ staffing formulas to be developed for appellate, probation, and pretrial services units
  - ✓ staffing changes reflecting other workforce efficiency efforts
  - ✓ administrative service delivery changes
  - ✓ IT server consolidation and aggregation
  - ✓ implementation of compensation system study recommendations
  - ✓ *U.S. Courts Design Guide* changes.

Sources of Growth

Most of the future cost growth is for the salaries and benefits of staff and judges, followed by rent increases, as indicated below and in Figure 3:

- ✓ Court support staff requirements are projected to increase $1.2 billion between fiscal year 2007 and fiscal year 2015, an increase of 58 percent;

- ✓ Not including additional judgeships that may be authorized by Congress, the cost of judges and chambers staff are projected to increase $707.2 million between fiscal year 2007 and fiscal year 2015, an increase of 70 percent;

- ✓ Excluding the rental cost implications of courthouse construction projects that have not yet been authorized by Congress, the cost of rent is projected to increase $571.5 million between fiscal year 2007 and fiscal year 2015, an increase of 53 percent;

- ✓ Law enforcement expense requirements are projected to increase $94.5 million between fiscal year 2007 and fiscal year 2015, an increase of 98 percent;
- ✓ Information technology are projected to increase $61.0 million between fiscal year 2007 and fiscal year 2015, an increase of 17 percent; and
- ✓ Other Salaries and Expenses requirements are projected to increase $166 million between fiscal year 2007 and fiscal year 2015, an increase of 46 percent.

Figure 3. Projected Growth in Salaries and Expenses Program Requirements FY 2007 - FY 2015