Agenda E-18 (Summary)
Rules
March 2005

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve proposed new Rule 5.1 and conforming amendments to Rule 24(c) and 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 ..... pp. 8-10

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

Agenda E-18
Rules
March 2005

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 13-14, 2005. Robert D. McCallum, Associate Attorney General, attended the meeting on behalf of the Deputy Attorney General, James B. Comey. All the other members attended, with the exception of David M. Bernick.

Representing the advisory rules committees were: Judge Samuel A. Alito, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, on behalf of Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, and Professor Jeffrey W. Morris, the advisory committee's reporter; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Susan C. Bucklew, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were John S. Davis, Associate Deputy Attorney General; Christopher A. Wray, Assistant Attorney General for the Criminal Division; Professor Sara Sun Beale; Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee

Support Office; James Ishida and Robert P. Deyling, attorney advisors in the Administrative Office; Joe Cecil of the Federal Judicial Center; and Professor R. Joseph Kimble (by telephone), Joseph F. Spaniol, and Professor Geoffrey C. Hazard, consultants to the Committee. In addition, Elizabeth Cabraser and Melvyn Goldman participated in a panel discussion on the American Law Institute's "transnational procedure project."

ELECTRONIC FILING

In August 2004, the Committee on Court Administration and Case Management (CACM) requested that the federal rules of practice be amended on an expedited basis to authorize federal courts to require parties by local rule to file papers electronically. The existing Appellate, Bankruptcy, Civil, and Criminal Rules authorize a court by local rule to "permit" a party to file papers by electronic means. Although many courts have prescribed local rules "requiring" a party to file papers electronically, some courts have been reluctant to do so in light of an inference drawn from the rules' limited prescriptive language.

CACM believes that mandatory electronic filing will achieve significant cost savings for federal courts. It recommends that courts be expressly authorized to require parties to file papers electronically to promote broader use of the Case Management/Electronic Case Filing system now being deployed in the courts nationwide. At the fall meetings, the Appellate, Bankruptcy, Civil, and Criminal Rules Committees considered CACM's proposal.

Advisory committee members expressed some concern that mandatory electronic filing could pose hardships for litigants who do not have access to a personal computer, suggesting that the national rules explicitly include provisions excepting appropriate individuals. The need for such a provision was questioned, however, because a study of local rules of courts that require a party to file papers electronically confirmed that each court already excepted pro se litigants and

others for good cause. No information was obtained during the study showing that any court unreasonably compelled a party to file a paper electronically. Moreover, developing an exception that applied in all courts was not possible at this time because local conditions vary so widely and the courts have not acquired sufficient experience with electronic filing to make a permanent rule change. Accordingly, the advisory committees declined to graft an exception in the national rules explicitly protecting pro se litigants and others similarly situated.

Other advisory committee members were concerned that the proposal might lead to a fragmented national filing system, with some courts requiring paper filing and others requiring electronic filing or a combination of both systems. The advisory committees concluded that it would be premature to adopt a single, uniform filing practice until the courts acquired more experience with electronic filing.

The advisory committees recommended that Federal Rule of Appellate Procedure 25(a)(2)(D), Federal Rule of Bankruptcy Procedure 5005(a)(2), and Federal Rule of Civil Procedure 5(e) be amended to expressly authorize courts by local rule to "permit or require" parties to file papers by electronic means to provide courts greater flexibility in operating their filing systems. (Federal Rule of Criminal Procedure 49(d) incorporates by reference the filing procedures in Civil Rule 5.) The advisory committees also recommended that the proposals be considered on an expedited basis, because they appear to be noncontroversial and likely will result in significant cost savings for the federal courts. Moreover, the proposed amendments revise the rules consistent with existing court practices.

Although recognizing that expedited consideration might establish bad precedent and lead to future requests to accelerate the rulemaking process, the advisory committees concluded that

the advantages of the proposals offset the potential disadvantages, and these proposals could be easily distinguished because of the unique circumstances surrounding them.

The Committee agreed with the advisory committees' recommendations to authorize a court by local rule to require a party to file a paper electronically. It also agreed with their recommendation to publish the proposed amendments immediately so that the advisory committees could consider the public comments at their spring 2005 meetings. The proposed amendments were published for public comment for a three-month period beginning November 10, 2004, and expiring on February 15, 2005. Public hearings were scheduled to coincide with hearings earlier scheduled for other proposed rules amendment, and a separate hearing was set for the amendment to the Appellate Rules, which had no other proposed amendments. Only one person requested to testify. At their spring 2005 meetings, the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will consider the witness's statement along with written comments submitted on the proposed amendments.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action.

Informational Items

The advisory committee approved amendments to Rule 4(a)(1)(B) and Rule 40(a)(1), but deferred asking to publish them for comment until a later date when future proposals could be added and transmitted in a single package. The proposed amendments make it clear that the extended 60-day appeal period and the extended 45-day period to file a petition for panel rehearing, respectively, apply in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

In April 2004, the advisory committee submitted for approval and transmission to the Judicial Conference a proposed new Rule 32.1, which permits the citation of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like and supersedes limitations imposed on such citation by circuit rules. The proposal submitted by the advisory committee was very limited. The advisory committee expressly took no position on whether unpublished opinions should have any precedential value, leaving that issue for the circuits to decide. At its June 2004 meeting, the Committee returned the proposed rule to the advisory committee, recommending that it work with the Federal Judicial Center to conduct empirical studies exploring the experiences of the nine courts of appeals that have adopted local rules permitting citation of unpublished opinions.

The advisory committee with the support of the Federal Judicial Center has initiated a study involving an examination of randomly selected opinions and surveys of appellate judges and practitioners. The study is intended to discover whether the circuits that have liberalized their citation rules have experienced any of the negative consequences predicted by commentators who oppose Rule 32.1. In addition, Administrative Office staff has conducted a statistical study on the median disposition time in the nine courts of appeals that adopted the permissive citation policy for the two years before and after the policy's adoption. The advisory committee plans to consider the data at its spring 2005 meeting.

The Federal Judicial Center submitted a report on its study of the disparate local rules governing the form and format of briefs, which led to a discussion of the many problems associated with proliferation of local rules in the courts of appeals. Several members remarked that the proliferation of local rules was becoming worse, causing waste and unnecessary litigation expense largely hidden from judges' eyes. The Committee encouraged the advisory committee to

consider ways to address this serious problem, recognizing that progress in limiting local rules is difficult.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1014 and 3007 with a recommendation that they be published for comment. The advisory committee also proposed amendments to Rule 7007.1, but recommended that the amended rule be approved without publication because the amendment was technical in nature.

The proposed amendment to Rule 1014 expressly recognizes the authority of a court to initiate on its own motion a change of venue after notice and hearing. The amendment dispels doubt about a court's authority to transfer a case to an appropriate district. A joint Committee on Chapter 11 Venue Issues, composed of members of the advisory committee and the Committee on the Administration of the Bankruptcy System, recommended the amendments to promote uniformity among the courts and facilitate fairness and efficiency.

The proposed amendments to Rule 3007 clarify the procedures governing a party who objects to a claim while simultaneously seeking affirmative relief.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to Rules 1014 and 3007.

The proposed amendment of Rule 7007.1 clarifies when a party must file a corporate ownership statement in an adversary proceeding. The amendment conforms to the language dealing with similar disclosure statements required in the Appellate, Civil, and Criminal Rules. The Committee determined that the proposal did not require immediate implementation and concluded that providing an opportunity to the public to comment on the proposal might be

helpful. The Committee agreed to publish for public comment the proposed amendments to Rule 7007.1.

Informational Items

Proposed amendments to Rules 1009, 2002(g) 4002, 5005, 7004, 9001(9), and 9036 and Schedule I of Official Form 6 were published for comment in August 2004. Public hearings on the proposed rules amendments were canceled because only two persons asked to testify. The two witnesses who requested to testify agreed to submit written statements in lieu of testifying. At its March 2005 meeting, the advisory committee will consider these statements along with written comments submitted on the proposed amendments (except as noted below).

Expedited Consideration of Proposed Cost-Savings Rules Amendments

The proposed amendments to Rules 2002(g), 9001(9), and 9036, published for comment in August 2004, could save the courts considerable amounts of money in mailing and administrative expenses. The advisory committee recommended that the amendments be processed on an expedited basis to reap the proposals' benefits as soon as possible. The proposed amendments appear to be noncontroversial, and no comments have been submitted on them.

Under the proposed amendments to Rule 2002(g), notice providers (newly defined entities under proposed amendments to Rule 9001(9)) may enter into agreements with creditors on the manner of service and mailing address to which service may be made. The amendments facilitate the transmission of notices to creditors that operate nationally by permitting a notice provider to send a creditor all notices to a centralized, agreed-upon electronic mailing address. Confirmation that an electronic notice was transmitted and received would no longer be required under the proposed amendments to Rule 9036.

The Committee agreed to process the proposals on an expedited basis. The advisory committee is expected to make its recommendation to the Committee immediately after the close of the comment period, February 15, 2005. The Committee in turn will poll its members electronically and act on the advisory committee's recommendations in time to present the proposed rules amendments to the Judicial Conference for consideration at its March 2005 session. The Conference's recommendations could be transmitted in March 2005 to the Supreme Court in time for the Court to promulgate these rules amendments by May 1, 2005, with the amendments taking effect on December 1, 2005, absent congressional action to the contrary. The Supreme Court has been advised of this schedule.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed new Rule 5.1 and conforming amendments to Rule 24(c) with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2003. The scheduled public hearing on the proposed amendments was canceled because no one asked to testify. Although no adverse comment was submitted, the advisory committee raised some questions about particular aspects of the proposed new rule in its April 2004 meeting. Those questions were resolved at the October 2004 meeting. The advisory committee made some revisions to the published rule, primarily to accommodate the style project, to bring some language from the notes to the text.

As published for comment and as proposed for adoption, Rule 5.1 required a party to notify the appropriate federal or state government official if a filed pleading, motion, or other paper drew into question the constitutionality of a federal or state statute. The notice requirement supplemented the court's duty under 28 U.S.C. § 2403 to notify the appropriate government

official of a constitutional challenge to a statute. The new rule replaced the final three sentences of Rule 24(c) that set out the court's notification duty and urge a challenging party to call the court's attention to the court's duty.

Proposed Rule 5.1 responds to a specific problem. In a significant number of cases, the government has not received timely notification that the constitutionality of a law is challenged. As a result, the government cannot intervene in time to affect the record and play a meaningful role in the case. The new rule creates a dual-notice requirement designed to ensure that the appropriate government official is notified of constitutional challenges to a federal law or state statute to allow timely intervention. The duties of the party and the court to notify the government of a constitutional challenge are set out in a stand-alone rule, moved to be placed with the rules governing service and notice, which should draw more attention than the existing provision contained in the Rule 24 intervention rule. After renewed consideration, the advisory committee determined that the advantage in ensuring that the government has a timely opportunity to defend a statute's constitutionality clearly offsets the minimal burden imposed on a party to notify the government. The burden may be reduced very low if courts that accept electronic filing develop the capability of automatically sending an electronic notification to the appropriate government official on filing of the party's Notice of Constitutional Question. The proposed rule is similar to a number of state statutes that require both the party and the court to notify the attorney general when the constitutionality of a statute is drawn into question.

The advisory committee revised the proposed rule published for comment to clarify that: (1) proceedings would not be delayed pending transmission of the certification; (2) a party could transmit the certification electronically to an address designated by the attorney general; (3) the time to intervene is 60 days from the earlier of the party's filing notice or the court's certification, but the court can extend the period to intervene; and (4) a court could reject a constitutional

challenge at any time, but could not enter a final judgment holding a statute unconstitutional before the time set to intervene expired. The Department of Justice supports the proposed new rule.

The Committee concurred with the advisory committee's recommendations, with two members voting to recommit the proposed amendments to the advisory committee for further revision. It was understood that the proposed amendments, if approved, would be transmitted along with other proposed rules amendments to the Supreme Court after the Judicial Conference meets in September 2005.

> **Recommendation:** That the Judicial Conference approve proposed new Rule 5.1 and conforming amendments to Rule 24(c) and 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.

The proposed amendments to the Federal Rules of Civil Procedure are in Appendix A with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed style amendments to the Federal Rules of Civil Procedure, including Rule 23 and Rules 64 through 86. The proposed amendments are part of a comprehensive style project to clarify the civil rules, improve and modernize expression, and remove inconsistent uses of words and conventions. The style project follows up on the comprehensive style revisions of the Federal Rules of Appellate and Criminal Procedure. The proposed style amendments are not intended to change the meaning or effect of the rules.

The revision of this group of rules is the last installment of style amendments to the civil rules. The advisory committee also completed one final review to ensure that words and phrases that are intended to have the same meaning are used consistently throughout all the restyled civil rules. The entire set of civil rules, as revised, is ready for publication.

Separately, the advisory committee considered a handful of amendments so modest and noncontroversial that they might reasonably have been included as style changes in the overall revision of the rules, but the advisory committee determined to publish them by themselves consistent with the Committee's stringent policy that only pure style changes be included in the comprehensive revision. As part of this package of amendments, the advisory committee proposed that amendments to Rule 71A (redesignated as Rule 71.1) and Rule 78, addressing minor and noncontroversial matters, accompany the style proposals. The proposed amendments to Rule 71A add the telephone number of the plaintiff's attorney and a reminder of a defendant's right to appear without answering in the notice to the defendant, consistent with the language of Civil Rules Form 28. Under the proposed amendment of Rule 78, the provision authorizing a court to make scheduling orders is deleted because Rule 16 has superseded any need for it.

The advisory committee submitted the entire set of restyled rules with a recommendation that they be published for comment. The advisory committee recommended that the publication period run from February to December 30, 2005. The style project represents a large body of material, and the longer publication period allots more time than the usual six months provided to the bench, bar, and public to study and comment on the proposals. In addition, the advisory committee submitted proposed amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40, which had been earlier approved by the Committee, and Rules 71A and 78, addressing minor and noncontroversial amendments to accompany the style proposals.

The Committee approved the recommendations of the advisory committee to publish the proposed comprehensive style revision of the civil rules and the proposed noncontroversial amendments to the bench and bar for comment for a period beginning in February and expiring on December 30, 2005.

Discovery of Electronically Stored Information

Proposed amendments to Rules 16, 26, 33, 34, 37, and 45 and revisions to Form 35 were published for comment in August 2004. The proposed amendments are aimed at discovery of electronically stored information. Three public hearings on the proposed rules amendments were scheduled. Over 60 witnesses submitted requests to testify at one of the hearings. At its April 2005 meeting, the advisory committee will consider the statements of witnesses testifying at the hearings along with written comments submitted on the proposed amendments.

Informational Item

Senator Herb Kohl (D-Wis.) had introduced legislation that would require a court to make specific findings before a settlement agreement can be sealed (Sunshine in Litigation Act of 2003, S. 817, 108th Cong., 1st Sess.). Early in 2003, Senator Kohl requested the Judicial Conference to study the need for a rule amendment to address this issue. The advisory committee requested the Federal Judicial Center to conduct a study of sealed settlements filed in federal courts. On December 16, 2003, Director Leonidas Ralph Mecham, as Secretary to the Judicial Conference, sent Senator Kohl a letter reporting the status of the Center's study and its preliminary findings, which showed a very low incidence of settlement agreements sealed by court order. The Center completed the study in April 2004. The findings in the completed study were consistent with the preliminary findings.

On November 17, 2004, Director Mecham sent a follow-up letter to Senator Kohl enclosing the final report of the Federal Judicial Center. The Director informed Senator Kohl that the advisory committee concluded that no amendment to the Federal Rules of Civil Procedure was appropriate because of the relatively small number of cases involving a sealed agreement, the availability of other sources, including the complaint, to inform the public of potential hazards involved in cases involving a sealed settlement agreement, and the questionable

authority and ability of the committee to regulate confidentiality provisions enforced by state substantive laws.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action.

Informational Items

Proposed amendments to Rules 5, 32.1, 40, 41, and 58 were circulated to the bench and bar for comment in August 2004. The scheduled public hearings on the proposed rules amendments were canceled because no one asked to testify. At its April 2005 meeting, the advisory committee will consider the written comments submitted on the proposed amendments.

At its April 2004 meeting, the advisory committee declined to proceed with amendments to Rule 29 proposed by the Department of Justice that would require a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. Under the present rule, a judge's ruling on a judgment of acquittal motion, if made before the return of the jury verdict, is rendered unappealable by the Double Jeopardy Clause of the Constitution. The advisory committee concluded that the number of these rulings granting a judgment of acquittal before a jury verdict is relatively small and did not warrant a rule change.

The Department of Justice presented a report to the Committee containing empirical and anecdotal evidence shedding new light on Rule 29 pre-verdict acquittals. It requested that the advisory committee reconsider the proposed amendments to Rule 29. In its presentation, the Department noted that it would welcome alternative ways to address the issue, including a proposal that would allow a defendant to move for a pre-verdict acquittal but only if the defendant waived the protections provided by the Double Jeopardy Clause, preserving the government's right to appeal the decision. The Committee concluded that this matter raised

important issues and requested that the advisory committee review the issue again, draft a rule that it believed would address the Department's proposal, and submit the proposed amendments to the Committee with a recommendation to either publish or not publish the amendments for public comment.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Informational Item

Proposed amendments to Rules 404(a), 408, 608(b), and 609 were circulated to the bench and bar for comment in August 2004. Each of the proposed rules amendments addresses longstanding conflicts among the courts of appeals. The scheduled public hearings on the proposed rules amendments were canceled because no one asked to testify. At its April 2005 meeting, the advisory committee will consider the written comments submitted on the proposed amendments.

E-GOVERNMENT ACT OF 2002

In 2001, the Judicial Conference adopted a privacy policy governing public access to appellate, bankruptcy, civil, and criminal case files on the recommendation of the Committee on Court Administration and Case Management (JCUS-SEP/OCT 01, pp. 48-50). Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court is to prescribe rules in accordance with the Rules Enabling Act governing the privacy and security concerns arising from public access to electronic case files. The Act does not impose a deadline to prescribe the rules, but provides that the Conference privacy policy will serve as interim rules until the Supreme Court acts.

The Committee's chair established the E-Government Subcommittee with representatives from each advisory rules committee and liaisons from the Committees on Court Administration and Case Management (CACM), Criminal Law, and Information Technology. The subcommittee developed a template rule to serve as a model for the various sets of rules. In general, the template is consistent with the Judicial Conference privacy policy, which supports public access to electronic filings to the same extent that they are available at the courthouse. In accordance with the E-Government Act, the template requires that certain personal identifier information be redacted from documents, with certain specified exceptions. Also the public would not have remote access to social security and immigration cases, because they contain substantial amounts of sensitive information. The template expressly recognizes the authority of a court to seal documents entirely or limit remote access on good cause.

The individual advisory committees have reviewed the template, and each has revised it to account for circumstances unique to its set of rules. The subcommittee continues to work with the advisory committees to ensure as much uniformity and consistency among the different sets of rules as possible. The revised rules will be considered and acted on by each advisory rules committee at their respective spring 2005 meeting with an eye to publication in August 2005.

AMERICAN LAW INSTITUTE'S TRANSNATIONAL PROCEDURE PROJECT

Dean Mary Kay Kane led a panel discussion on the American Law Institute's (ALI) transnational procedure project with Professor Geoffrey C. Hazard, the Committee's consultant, and Elizabeth Cabraser and Melvyn Goldman, two accomplished private practitioners. Professor Hazard is the lead reporter on the ALI project. The project is aimed at providing an international set of principles governing commercial cases involving sophisticated counsel and clients, but it can be applied to other cases. Professor Hazard described the primary features of the project designed to simplify litigation by providing for more fact pleading, limited discovery, statement

of witnesses instead of oral testimony on direct examination, and introduction of a motion demanding proof, similar to a motion for summary judgment.

There was general consensus that litigation in today's federal courts is becoming more expensive and less accessible to most individuals and to a growing number of businesses. The Committee encouraged the advisory committees, especially the Civil Rules Committee, to monitor projects like the American Law Institute's transnational project, with an eye to considering changes in the rules simplifying procedures and reducing litigation costs.

LONG-RANGE PLANNING

The Committee was provided a report of the September 20, 2004, meeting of the Judicial Conference's committee chairs involved in long-range planning.

Respectfully Submitted,

David F. Levi

David M. Bernick
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James B. Comey
Charles J. Cooper
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Appendix A — Proposed Amendments to the Federal Rules of Civil Procedure

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

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 17, 2004**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Santa Fe, New Mexico, on October 28 and 29, 2004.

* * * * *

Part I of this report presents action items. Part I A recommends transmission for approval of new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c). These proposals were published for comment in August 2003. They were discussed and revised at the April and October 2004 meetings. The Committee believes that the revisions do not require republication.

* * * * *

I Action Items

A. Rules for Adoption: New Civil Rule 5.1 — Notice of Constitutional Question; Conforming Rule 24 Changes

The Advisory Committee recommends approval for adoption of new Civil Rule 5.1, and a conforming amendment of Civil Rule 24(c), as follow on the next pages:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged — or on the state attorney general if a state statute is challenged — either by certified or registered mail or by sending it to an

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

electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party that files a

pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute to file a notice of constitutional question and serve it on the United States Attorney General or state attorney general. The party must promptly file and serve the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or state attorney general. The notice of constitutional question will ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the attorney general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a "federal statute," rather than the § 2403 reference to an "Act of Congress," to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during the intervention

period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 24(c)

The provisions of Rule 24(c) that now address the questions covered by new Rule 5.1 should be deleted if Rule 5.1 is approved for adoption:

Rule 24. Intervention

* * * * *

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. ~~When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C.,~~

~~§ 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.~~

* * * * *

Committee Note

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C. § 2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn in question.

Changes Made After Publication and Comment

Rule 5.1 as proposed for adoption incorporates several changes from the published draft. The changes were made in response to public comments and Advisory Committee discussion.

The Advisory Committee debated at length the question whether the party who files a notice of constitutional question should be required to serve the notice on the appropriate attorney general. The service requirement was retained, but the time for intervention was

set to run from the earlier of the notice filing or the court's certification. The definition of the time to intervene was changed in tandem with this change. The published rule directed the court to set an intervention time not less than 60 days from the court's certification. This was changed to set a 60-day period in the rule "[u]nless the court sets a later time." The Committee Note points out that the court may extend the 60-day period on its own or on motion, and recognizes that an occasion for extension may arise if the 60-day period begins with the filing of the notice of constitutional question.

The method of serving the notice of constitutional question set by the published rule called for serving the United States Attorney General under Civil Rule 4, and for serving a state attorney general by certified or registered mail. This proposal has been changed to provide service in all cases either by certified or registered mail or by sending the Notice to an electronic address designated by the attorney general for this purpose.

The rule proposed for adoption brings into subdivision (c) matters that were stated in the published Committee Note but not in the rule text. The court may reject a constitutional challenge at any time, but may not enter a final judgment holding a statute unconstitutional before the time set to intervene expires.

The published rule would have required notice and certification when an officer of the United States or a state brings suit in an official capacity. There is no need for notice in such circumstances. The words "is sued" were deleted to correct this oversight.

Several style changes were made at the Style Subcommittee's suggestion. One change that straddles the line between substance and style appears in Rule 5.1(d). The published version adopted the language of present Rule 24(c): failure to comply with the Notice or certification requirements does not forfeit a constitutional "right." This expression is changed to "claim or defense" from concern that reference to a "right" may invite confusion of the no-forfeiture provision with the merits of the claim or defense that is not forfeited.

Discussion

The impetus for adopting a new rule to implement the certification requirements of 28 U.S.C. § 2403 has been described in earlier reports. The Attorney General — and several state attorneys general — report that they experience imperfect implementation of the court's duty to certify a constitutional challenge to a statute. Present Rule 24(c) is intended to remind the parties and court of § 2403, but location of this provision in the rule governing intervention means that it is likely to be consulted only when someone is seeking to intervene. Relocation to a position at the beginning of the rules may better draw attention to the statute and its implementation.

Beyond relocation, several changes from present Rule 24(c) may improve the implementation of § 2403. Some of the changes are drawn from the model of Appellate Rule 44. The change most likely to make a difference is the creation of a dual-notice requirement. A party who files a notice of constitutional question must serve the notice on the attorney general, while § 2403 itself continues to require that the court certify the question. The party's service will often occur well before the court even becomes aware of the question. Many states have similar dual-notice requirements, which seem to work well.

Rule 5.1 was published for comment in August 2003, along with conforming changes in Rule 24(c). The public comments and renewed discussion at the April Advisory Committee meeting raised questions that were discussed further at the October 2004 Advisory Committee meeting. Changes were made to reflect the discussion and the rule proposed for adoption was approved by e-mail Committee ballot.

The list of changes from the published draft may seem long, but the Advisory Committee believes that the revised Rule 5.1 can be recommended for adoption without republication. There was a point in the April meeting when republication was recommended because the Committee had decided to eliminate the published requirement that the party filing a Notice of Constitutional Question serve the notice on the attorney general. Restoration of the service requirement eliminates the basis for the recommendation. Most of the remaining

changes clearly do not warrant republication — they involve style improvements, or bring into the text of the rule matters that were included in the published Committee Note. The only new issue that could not have been anticipated in the original comment period is the decision to run intervention time from the earlier of notice filing or certification. That change does not seem to warrant republication, particularly in light of the provision that allows the court to set a later time. Department of Justice representatives have worked closely with the Advisory Committee and are satisfied not only with the recommended rule but also with the notice and intervention-time changes made from the published draft.

Summary of Comments: August 2003 Rule 5.1

03-CV-005, Hon. Geraldine Mund: As to style, it is better to say "A party who" rather than "A party that." This rule should be incorporated in the Bankruptcy Rules "as we receive constitutional challenges to both state and federal statutes and there is no requirement here that notice be given in a bankruptcy case."

03-CV-008, State Bar of California Committee on Federal Courts: (1) Creating a new Rule 5.1 "seems likely to highlight the notice requirement in a way the current rules fail to do." The Committee supports this. (2) Rather than set a minimum 60-day period for intervention, the period should be set in the district court's discretion. Action is likely to be frozen for the 60 days, and that can thwart timely relief. Rule 24 requires timely intervention; that suffices. There is no indication that state or federal governments have suffered for lack of an explicit time period for intervention. The analogy to the 60-day answer period in Rule 12(b)(3)(A) is not persuasive; the statutory challenge may arise later in the litigation, and for that matter some statutes require the government to answer in less than 60 days. (3) Literally, Rule 5.1 may require multiple notices; a party should be required to file only one notice in a single case.

03-CV-005, State Bar of Michigan Committee on Federal Courts: (1) Delete "sued" from both (a)(1) and (a)(2): "and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity." Notice should not be required if an officer or employee of the United States is a plaintiff in

an official capacity. Appellate Rule 44 reads: "in which the United States or its agency, officer, or employee is not a party in an official capacity." (2) There is no reason to require the party to give notice; notice from the court clerk, required by statute, suffices. (3) But if the rule does provide that the party give notice, (a)(2)(B) should specify the method of serving notice on the State Attorney General: "serve * * * the State Attorney General by sending copies by registered or certified mail."

03-CV-010, Bill Lockyer, Attorney General of California: Supports the proposal. "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied. As a result, we are frequently ignorant of pending litigation in district court that involves the constitutionality of a state statute. Proposed Rule 5.1 increases the likelihood that an Attorney General will be notified of such litigation * * *." And it is good to reach all statutes, not only those that affect the public interest.

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U. S. Department of Justice: Expresses the Department of Justice's "strong support of the final proposal." (1) Despite § 2403 and Civil Rule 24(c), "there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding." Requiring notice by a party in addition to the court certification "will ensure that the Attorney General is made aware of constitutional challenges in a timely manner." The incremental burden on the parties is slight — Rule 24(c) now requires the party to call the court's attention to the duty to certify. (2) The 60-day intervention period recognizes "the Department's internal administrative procedures that must be followed upon receipt of a notice." But the Committee Note should state that Rule 5.1 does not itself restrict the Attorney General's opportunity to intervene more than 60 days after the Rule 5.1(b) certification, and that the rule does not limit the opportunity to intervene after final judgment if a party or the court fails to comply with the duty to give notice or certify. (3) After considering other possible methods of serving the party's notice, the Department has concluded that service in the manner provided by Civil Rule 4(i)(1)(B) "will best ensure timely and proper processing of notices." (4) The differences between Civil Rule 5.1

and Appellate Rule 44 are justified. It is important that the government have an opportunity to be present "as a party in district court, where the factual record is made and constitutional arguments are developed." In addition, notice "under Appellate Rule 44 functions more smoothly given the nature of the appeals process and the centralized circuit court structure." (This comment also expresses approval of several other features of proposed Rule 5.1 that have not drawn adverse comment by other participants.)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports Rule 5.1, and specifically mentions (1) moving this out from Rule 24(c); (2) placing the burden of notification on the party that brings constitutionality into question; (3) addressing the "interface with" the § 2403 certification requirement; and (4) establishing a 60-day intervention period.
Ken Salazar, Attorney General of Colorado, October 20, 2004: Under the present rule, "I am not confident that the notices of challenges are sent consistently to my office. By placing the obligation for notice on the party challenging the statute in addition to the court, the new rule will result in a greater likelihood that the attorneys general will receive notification of challenge to the constitutionality of a state statute in a prompt manner." This obligation "will not be new to Colorado practitioners." Colorado state practice imposes a similar obligation. Placing the new requirement in a separate rule is a good idea; present Rule 24(c) "can easily be overlooked." And it is wise to expand the notice requirement by deleting the § 2403 limit that requires certification only if the statute affects the public interest; it is better that the attorney general determine whether to seek intervention on the ground that the public interest is affected.

Patrick C. Lynch, Attorney General of Rhode Island, October 20, 2004: "I write to strongly support the adoption of Proposed Federal Rule of Civil Procedure 5.1." The requirement that a party file a Notice of Constitutional Challenge and serve it on the Attorney General "will ensure that proper and timely notice is given to the State Attorney General of constitutional challenges."

* * * * *

(Rev. 2/22/05)
Agenda E-18 (Summary)
Rules
March 2005

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve proposed new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c) and 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.....pp. 8-10

2. Approve the proposed amendments to Bankruptcy Rules 2002, 9001, and 9036 and 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.....Addendum

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Expedited Consideration of Proposed Amendments to Federal Rules of Bankruptcy Procedure Producing Cost Savings for the Federal Judiciary

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002(g), 9001(9), and 9036, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2004. The public comment period expired on February 15, 2005. The scheduled public hearing on the amendments was canceled because no one requested to testify on these proposed amendments. No comments on the proposed amendments were submitted.

The proposed amendments are expected to save the courts considerable amounts of money in mailing and administrative expenses. As noted in the original report, the Committee decided to process the proposed amendments on an expedited basis to reap the proposals' benefits as soon as possible. The amendments will take effect twelve months earlier under the expedited rulemaking.

The Committee's report explained that under the proposed amendments to Rule 2002(g), notice providers (newly defined entities under proposed amendments to Rule 9001(9)) may enter into agreements with creditors on the manner of service and mailing address to which service may be made. The amendments facilitate the transmission of notices to creditors that operate nationally by permitting a notice provider to send a creditor all notices to a centralized, agreed-upon electronic mailing address.

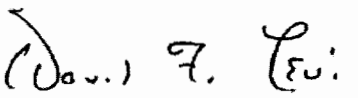
Confirmation that an electronic notice was transmitted and received would no longer be required under the proposed amendments to Rule 9036. Many internet service providers no longer provide such confirmations, and confidence in the delivery of electronic transmissions now rivals or exceeds confidence in the delivery of mail. The advisory committee considered adding a provision recognizing that service of notice is not effective if the sender learns that the transmission of the notice was never received, paralleling a similar provision in Civil Rule 5. But the advisory committee decided that adding the provision to Rule 9036 was unnecessary because, though inapplicable to non-contested matters, Civil Rule 5 applies by incorporation to adversary proceedings and contested matters and a court would unlikely find notice effective if it is established that the notice was never received.

The advisory committee recommends that the amendments to the three Bankruptcy Rules be approved and transmitted to the Judicial Conference. The Committee concurs with the advisory committee's recommendation.

> **Recommendation**: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2002, 9001, and 9036 and 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.

The proposed amendments to the Federal Rules of Bankruptcy Procedure are in Appendix B with excerpts from the advisory committee's reports.

Respectfully Submitted,



David F. Levi

David M. Bernick	John G. Kester
David J. Beck	Mary Kay Kane
James B. Comey	Mark R. Kravitz
Charles J. Cooper	J. Garvan Murtha
Sidney A. Fitzwater	Thomas W. Thrash
Harris L. Hartz	Charles Talley Wells

Appendix B — Proposed Amendments to the Federal Rules of Bankruptcy Procedure

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

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

FROM: **Hon. A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **December 15, 2003**

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

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 18-19, 2003, in Stevenson, Washington. The Committee considered a number of issues and will continue discussion of several matters at its next meeting. The Committee also adopted several proposed amendments to the Bankruptcy Rules and Forms for recommendation to the Standing Committee.

II. Action Items

A. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 5005(c) and 9036

1. Synopsis of Proposed Amendments

* * * * *

B. Rule 9036 is amended to delete the current language that requires the sender of an electronic notice to have received confirmation of receipt of that notice for the notice to be complete. At the time the rule was promulgated, the sender of an electronic communication generally would receive a notification that the recipient of the notice actually received it. For the vast majority of internet service providers, these receipt notifications are no longer given. Moreover, the general level of confidence with electronic communications has increased to the point that it is presumed that these messages are received in the proper course, at least to the extent that other forms of notice (such as by regular mail) also are received. The amendment affirmatively states that the notice is complete upon its transmission. This is consistent with the treatment of notice by regular mail under the Bankruptcy Rules. It is also consistent with Civil Rule 5(b)(2)(B) and (D) that provide that service by mail and by electronic means is complete upon transmission.

The text of the proposed amendments to Bankruptcy Rules 5005(c) and 9036 are set out at the end of this Report.

* * * * *

Attachments: Proposed Amendments to Bankruptcy Rules 5005 and 9036

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

* * * * *

Rule 9036. Notice by Electronic Transmission

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. ~~Notice by electronic transmission is complete, and the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received.~~ Notice by electronic means is complete on transmission.

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

COMMITTEE NOTE

The rule is amended to delete the requirement that the sender of an electronic notice must obtain electronic confirmation that the notice was received. The amendment provides that notice is complete upon transmission. When the rule was first promulgated, confirmation of receipt of electronic notices was commonplace. In the current electronic environment, very few internet service providers offer the confirmation of receipt service. Consequently, compliance with the rule may be impossible, and the rule could discourage the use of electronic noticing.

Confidence in the delivery of email text messages now rivals or exceeds confidence in the delivery of printed materials. Therefore, there is no need for confirmation of receipt of electronic messages just as there is no such requirement for paper notices.

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

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

FROM: **Honorable A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 17, 2004**

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

I. Introduction

* * * * *

The Advisory Committee also studied a number of proposals to amend the Bankruptcy Rules. After careful consideration, the Advisory Committee resolved to recommend that the Standing Committee approve for publication a preliminary draft of proposed amendments to Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and to Schedule I of Official Form 6. The Style Consultants to the Standing Committee offered a number of suggestions that were considered by the Advisory Committee's Style Subcommittee, and the proposals set out below in the Action Items section of the report reflect those joint efforts.

II. Action Items

* * * * *

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

The Advisory Committee recommends that the Standing Committee approve the following preliminary draft of proposed amendments to the Bankruptcy Rules and Official Forms for publication for comment.

1. Synopsis of Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

* * * * *

(b) Rule 2002(g) is amended by adding a new subdivision (g)(4) that authorizes entities and notice providers to agree on the manner and address to which service may be effected. The amendment is intended to facilitate notices to creditors that operate on a national basis, although the rule allows such agreements by any entity with any notice provider. A related amendment to Rule 9001 defines notice providers.

* * * * *

(e) Rule 9001 is amended to add a definition of notice provider to the rule. The definition is to be read in conjunction with the proposed amendment to Rule 2002(g).

* * * * *

2. Text of Preliminary Draft of Proposed Amendments to Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

* * * * *

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee**

* * * * *

(g) ADDRESSING NOTICES.

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision –

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

** The amendment to Rule 9001 should be considered in tandem with the proposed amendment to Rule 2002. Rule 9001 as proposed to be amended is set out at the end of this section of the report.

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.

(4) Notwithstanding Rule 2002(g) (1) - (3), an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice. The notice provider's failure to

use the supplied address does not invalidate any notice that is otherwise effective under applicable law.

* * * * *

COMMITTEE NOTE

A new paragraph (g)(4) is inserted in the rule. The new paragraph authorizes an entity and a notice provider to agree that the notice provider will give notices to the entity at the address or addresses set out in their agreement. Rule 9001(9) sets out the definition of a notice provider.

The business of many entities is national in scope, and technology currently exists to direct the transmission of notice (both electronically and in paper form) to those entities in an accurate and much more efficient manner than by sending individual notices to the same creditor by separate mailings. The rule authorizes an entity and a notice provider to determine the manner of the service as well as to set the address or addresses to which the notices must be sent. For example, they could agree that all notices sent by the notice provider to the entity must be sent to a single, nationwide electronic or postal address. They could also establish local or regional addresses to which notices would be sent in matters pending in specific districts. Since the entity and notice provider also can agree on the date of the commencement of service under the agreement, there is no need to set a date in the rule after which notices would have to be sent to the address or addresses that the entity establishes. Furthermore, since the entity supplies the address to the notice provider, use of that address is conclusively presumed to be proper. Nonetheless, if that address is not used, the notice still may be effective if the notice is otherwise effective under applicable law. This is the same treatment

given under Rule 5003(e) to notices sent to governmental units at addresses other than those set out in that register of addresses.

The remaining subdivisions of Rule 2002(g) continue to govern the addressing of a notice that is not sent pursuant to an agreement described in Rule 2002(g)(4).

* * * * *

Rule 9001. General Definitions

* * * * *

(9) "Notice provider" means any entity approved by the Administrative Office of the United States Courts to give notice to creditors under Rule 2002(g)(4).

(10) ~~(9)~~ "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

(11) ~~(10)~~ "Trustee" includes a debtor in possession in a chapter 11 case.

(12) ~~(11)~~ "United States trustee" includes an assistant

United States trustee and any designee of the United States trustee.

COMMITTEE NOTE

The rule is amended to add the definition of a notice provider and to renumber the final three definitions in the rule. A notice provider is an entity approved by the Administrative Office of the United States Courts to enter into agreements with entities to give notice to those entities in the form and manner agreed to by those parties. The new definition supports the amendment to Rule 2002(g)(4) that authorizes a notice provider to give notices under Rule 2002.

Many entities conduct business on a national scale and receive vast numbers of notices in bankruptcy cases throughout the country. Those entities can agree with a notice provider to receive their notices in a form and at an address or addresses that the creditor and notice provider agree upon. There are processes currently in use that provide substantial assurance that notices are not misdirected. Any notice provider would have to demonstrate to the Administrative Office of the United States Courts that it could provide the service in a manner that ensures the proper delivery of notice to creditors. Once the Administrative Office of the United States Courts approves the notice provider to enter into agreements with creditors, the notice provider and other entities can establish the relationship that will govern the delivery of notices in cases as provided in Rule 2002(g)(4).

* * * * *