

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of January 6-7, 2000  
Coral Gables, Florida

**Minutes**

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Coral Gables, Florida on Thursday and Friday, January 6-7, 2000. The following members were present:

Judge Anthony J. Scirica, Chair  
David H. Bernick, Esquire  
Judge Michael Boudin  
Judge Frank W. Bullock, Jr.  
Charles J. Cooper, Esquire  
Professor Geoffrey C. Hazard, Jr.  
Judge Phyllis A. Kravitch  
Gene W. Lafitte, Esquire  
Judge J. Garvan Murtha  
Judge A. Wallace Tashima  
Chief Justice E. Norman Veasey  
Judge William R. Wilson, Jr.

Patrick F. McCartan was unable to attend the meeting. The Department of Justice was represented by Acting Associate Attorney General Daniel Marcus. Roger A. Pauley, Director (Legislation) of the Office of Policy and Legislation of the Department of Justice, also attended the meeting on behalf of the Department. In addition, the committee's former chair, Judge Alicemarie H. Stotler, and former committee members Judge Morey L. Sear and Sol Schreiber participated in the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, deputy chief of that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —  
Judge Will L. Garwood, Chair  
Patrick J. Schiltz, Reporter  
Advisory Committee on Bankruptcy Rules —  
Judge Adrian G. Duplantier, Chair  
Professor Jeffrey W. Morris, Reporter  
Advisory Committee on Civil Rules —  
Judge Paul V. Niemeyer, Chair  
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —  
Judge W. Eugene Davis, Chair  
Professor David A. Schlueter, Reporter  
Advisory Committee on Evidence Rules —  
Judge Milton I. Shadur, Chair  
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center. Judge Carol Bagley Amon (E.D.N.Y.), chair of the Committee on Codes of Conduct, participated by telephone in the committee's discussion on financial disclosure.

#### INTRODUCTORY REMARKS

Chief Bankruptcy Judge Robert Mark welcomed the members to the Miami area on behalf of all the federal judges in the Southern District of Florida.

#### *Acknowledgements*

Judge Scirica read a resolution approved by the Judicial Conference recognizing Judge Alicemarie Stotler for her outstanding service, first as a member, and then as chair, of the Standing Committee on Rules of Practice and Procedure. Judge Stotler responded that it had been a great honor and privilege to have served the committee, and she expressed her delight that Judge Scirica had been appointed by the Chief Justice as her successor. She said that she missed the work of the committee, and she also missed attending the meetings of the advisory committees.

Judge Stotler emphasized that the rules committees enjoyed substantial credibility among the members of the Judicial Conference because of the thorough and careful work of the advisory committees, the public comment and hearing process, and the independent review given to all proposals by the Standing Committee. As a result, she said, the Conference has given substantial deference to the committees' proposed amendments to the rules.

Judge Stotler said that she was greatly impressed by how much work the Advisory Committee on Appellate Rules had accomplished in preparing a package of proposed amendments to the appellate rules, consisting of various proposals that had been held in abeyance until the restyled body of appellate rules had taken effect. She added that she was equally impressed by how far the Advisory Committee on Criminal Rules had proceeded with its restyling of the Federal Rules of Criminal Procedure.

Judge Stotler singled out the Rules Committee Support Office of the Administrative Office for special recognition. She stated that the uniform dockets and charts that the office prepares are extremely helpful to the members in monitoring all the various proposals submitted for changes in the rules.

Judge Scirica also presented certificates, signed by Chief Justice Rehnquist and Administrative Office Director Mecham, recognizing Judge Morey L. Sear and Sol Schreiber for their distinguished service to the committee. He thanked both of them personally and gave them the opportunity to say a few words about their service on the committee. Judge Scirica also pointed out that the terms of Judges James A. Parker and William R. Wilson, Jr. had expired, and he said that they would be sorely missed.

Judge Scirica then welcomed the three new members of the committee — Judge Boudin, Judge Murtha, and Mr. Bernick.

#### *September 1999 Judicial Conference Meeting*

Judge Scirica reported that all the proposed amendments to the rules submitted to the Judicial Conference at its September 1999 meeting had been approved, save one. He pointed out that most of the amendments had been placed on the Conference's consent calendar and approved automatically. But a few had been placed on the Conference's discussion calendar, including the proposed amendments to FED. R. CIV. P. 26(a)(1) (mandatory disclosure), FED. R. CIV. P. 26(b)(2) (scope of discovery), FED. R. CIV. P. 26(b)(2) (cost bearing), and FED. R. CIV. P. 30(d)(2) (presumptive limits on the time of depositions).

He noted that Conference members had received comments on the merits of the proposals directly from interested parties — some supporting the proposed changes and some opposing them. He said that the authors of the comments essentially repeated the same arguments that they had made during the public comment period, and all the arguments presented had been considered by the advisory committee and the standing committee.

Judge Scirica added that the Attorney General had sent a letter just a few days before the meeting of the Conference in which she reiterated the opposition of the Department of Justice, both to narrowing the scope of discovery under FED. R. CIV. P. 26(b)(2) and imposing a bright line test distinguishing lay testimony from expert testimony under FED. R. EVID. 701. He noted, however, that Rule 701 had not been placed on the discussion calendar of the Conference, and it did not receive the necessary 2/3 vote of the members to add it to the calendar.

Judge Scirica stated that the Chief Justice had been very gracious in allowing him, Judge Niemeyer, and Judge Smith sufficient time to present and defend the proposed amendments. He said that Conference members had asked several pointed questions about the proposed changes in the civil rules and that Judge Niemeyer had responded brilliantly to their concerns.

Judge Scirica noted that the first matter debated by the Conference was the proposed amendments to FED. R. CIV. P. 26(a)(1), which would make a limited amount of initial disclosure mandatory. He explained that the main concern of the members related to the proposed elimination of a local district court's right to opt out of the disclosure requirement. The debate, he said, had been very spirited, and the proposed amendment to Rule 26(a)(1) passed by a divided vote.

Judge Scirica said that the next matter debated was the proposed amendment to FED. R. CIV. P. 26(b)(2), governing the scope of discovery. He noted that a spirited attack was also made against this proposal. The debate was quite lengthy, as the members broke for lunch and then resumed the discussion after lunch. This proposed amendment, also, was approved by a divided vote.

Judge Scirica said that the Conference moved on to the proposed amendment to FED. R. CIV. P. 26(b)(2), dealing with cost bearing. Judge Niemeyer explained that the advisory committee believed that trial judges already have implicit authority to order a discovering party to share in the cost of discovery in appropriate circumstances. But the committee wanted to make the authority explicit.

Judge Scirica added that one member of the Conference had made a very thoughtful speech arguing that, while he understood well what the committee was trying to accomplish, the cost-bearing provision would send a wrong signal to the bar and could undermine the credibility of the whole package of civil rule amendments. He added that the cost-bearing provision would offer a target for critics to complain that the amendments would prejudice litigants with limited means. Therefore, Judge Scirica said, the proposed amendment was rejected.

Judge Scirica said that the proposed 7-hour, one-day presumptive limit on depositions, proposed in FED. R. Civ. P. 30(d)(2), was approved by the Conference.

Judge Scirica reported that Judge Smith addressed the Conference in support of the proposed amendments to FED. R. EVID. 702, governing expert testimony. One member of the Conference expressed skepticism about the advisability of codifying an area of the law that he believed to be elaborated adequately in Supreme Court decisions. The member also suggested that the amendment might take away flexibility from trial judges, but Judges Scirica and Niemeyer disagreed with him on this point.

A few weeks after the Conference meeting, it was discovered that one portion of the proposed amendments to FED. R. CIV. P. 26(b)(2) — that of eliminating the authority of a court to limit the number of interrogatories — had, through inadvertence, not formally been approved by the Conference. Therefore, a mail vote was taken after the Conference meeting, and the proposed amendment was approved by a mail vote.

*Observations on Judicial Conference Procedures*

Judge Scirica emphasized that it was very important for the rules committees to focus specifically on securing the approval of the Judicial Conference for proposed amendments to the rules. He offered two observations on recent Conference actions regarding rules proposals. First, he said, it was essential to present proposed rules amendments to the Conference in a severable manner. A single controversial provision contained in a set of non-severable amendments risks rejection or deferral of the entire package.

Second, he observed, Conference members are influenced by two competing considerations. On the one hand, they appreciate the great time and care that the rules committees take in preparing amendments — such as by soliciting public comments, conducting hearings, and subjecting the work of the advisory committees to a second, independent review. As a result of these thorough procedures, Conference members accord substantial deference to the work of the rules committees.

On the other hand, however, Conference members believe that the number and frequency of amendments to the federal rules should be limited. Although they recognize that there are a number of ambiguities and problems in the existing rules, the bar has learned to live with them, and the courts resolve problems through case law. Therefore, Conference members are of the view that amendments should generally be restricted to those matters that cause actual, serious problems in federal practice. In this regard, Judge Scirica pointed out that members of the Conference — particularly the trial judges — were very familiar with the discovery and disclosure provisions of the civil rules and very understanding of the committee's efforts to amend the rules.

Judge Niemeyer added that the focus of the efforts of the advisory committees has generally been on obtaining the approval of the Standing Committee. To that end, the advisory committees prepare detailed memoranda for the Standing Committee, have their chair and reporter explain each individual proposal orally, respond to questions at Standing Committee meetings, and make changes in the proposed rules and committee notes to accommodate concerns of the Standing Committee.

Under Judicial Conference operating procedures, however, members do not normally have access to the detailed written explanations and records prepared by the advisory committees. And they do not normally have the opportunity to engage in

extended oral dialogue with advisory committee representatives. Judge Niemeyer said that it takes time to explain rules changes fully and to respond to concerns of the members. Fortunately, he added, the Chief Justice had been particularly generous at the September 1999 Conference meeting in allowing a good deal of time to present and defend the proposed changes in the civil and evidence rules.

Several participants pointed to a growing, recent tendency for opponents of proposed rule amendments to make direct contact with members of the Judicial Conference or the Supreme Court in an effort to defeat or defer proposed amendments. They said that it is very difficult for the advisory committees to respond quickly or fully to these last-minute objections. Indeed, in many cases the rules committees may not even be aware of the contacts made with members of the Conference or the Court.

Judge Scirica added that he has followed the precedent established by Judge Stotler of sending a cover letter each year to the Supreme Court explaining the proposed changes in the rules. The letter invites the justices to contact him or the chairs of the advisory committees regarding any questions they may have on pending proposals. He added, however, that the justices have not in fact asked for additional explanations.

#### APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on June 14-15, 1999.**

#### REPORT OF THE ADMINISTRATIVE OFFICE

##### *Legislative Report*

Mr. Rabiej reported that the Administrative Office was monitoring 30 bills pending in Congress that would affect the rules or the rules process. Several of the bills would amend the federal rules directly.

He stated that one bill would amend FED. R. CIV. P. 30(b) and overturn the 1993 amendments that provide flexibility to litigants in the method of recording depositions. He noted that the Congress had been advised several times of the Judicial Conference's objection to the bill.

Mr. Rabiej noted a bill dealing with multi-district, multi-party cases. One part of it would supersede the Supreme Court's decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), and explicitly authorize a transferee judge in a multi-district litigation panel case to retain cases for trial. The second part of the bill

would provide federal jurisdiction over certain single-event mass tort cases. He said that there was general agreement as to the transferee judge provision, but that the legislation dealing with single-event mass torts was controversial.

Mr. Rabiej reported that a bill had passed the House that would greatly expand federal jurisdiction over class actions. He noted that the Administration was opposed to the legislation, and it had not received a margin of approval in the House sufficient to override a veto. The Judicial Conference, he said, opposed the legislation on the grounds of both federalism and increased workload.

Mr. Rabiej reported that two bills had been introduced in the Senate addressing attorney conduct in the wake of the recent "McDade" legislation, which makes attorneys subject to the discipline rules of the individual states and local federal court rules. One bill, introduced by Senator Hatch, would exempt federal government attorneys from certain state conduct rules. Another, introduced by Senator Leahy, would require the Judicial Conference to make recommendations to the Congress on attorney conduct rules in the federal courts.

Finally, Mr. Rabiej noted that the pending omnibus bankruptcy reform legislation, if enacted, would require major implementation efforts by the Advisory Committee on Bankruptcy Rules. First, a number of provisions in the pending legislation would require specific Judicial Conference action with regard to specific bankruptcy rules and forms. In addition, the breadth of the various substantive changes in the legislation would require the advisory committee to draft many amendments to the rules and create new rules forms to implement the changes.

#### REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary referred members to the list of pending Federal Judicial Center projects set out as Agenda Item 4. She pointed to a few of the projects that she said would be of particular interest to the rules committees, including preparation of a civil litigation management manual, a study on the use of special masters in the district courts, a template for a deskbook for chief circuit judges, a conference for chief circuit judges and circuit executives on administration, and a guide for judges in handling capital cases. She also noted that the History Office of the Center was about to place on the Internet its comprehensive biographical data base of all federal judges serving since 1789.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Garwood's memorandum and attachments of December 3, 1999. (Agenda Item 5) He said that the advisory committee was seeking authority to publish 21 proposed amendments to 12 rules and one proposed new form.

Judge Garwood pointed out that the Federal Rules of Appellate Procedure had been completely restyled, effective December 1, 1998. He said that the advisory committee had advised the Standing Committee that it would not proceed with any further amendments to the rules until the bar had been given a chance to become familiar with the restyled rules. He added that the proposed amendments being presented at this time had been approved at various meetings of the advisory committee over the past couple of years and then considered anew at the committee's October 1999 meeting.

Judge Garwood added that the advisory committee had considered a proposal to have all local rules take effect on December 1 of each year. But, he said, the proposal apparently conflicts with the Rules Enabling Act, which authorizes the courts to prescribe the date that their local rules will take effect. Accordingly, the proposal has been held in abeyance.

## FED. R. APP. P. 1(b)

Professor Schiltz said that the advisory committee recommended deletion of Rule 1(b), which states that the Federal Rules of Appellate Procedure do not extend or limit the jurisdiction of the courts of appeals. This, he said, is no longer true because legislation in 1990 gave the Supreme Court authority to use the rules to define the finality of district court rulings for purposes of 28 U.S.C. § 1291. Additional legislation in 1992 gave the Court authority to authorize interlocutory appeals beyond those already defined in 28 U.S.C. § 1292.

He said that any rules promulgated under these authorities will in fact affect the jurisdiction of the courts of appeals. Therefore, Rule 1(b) is obsolete and needs to be abrogated.

**The committee approved the proposed amendment for publication without objection.**

## FED. R. APP. P. 4(a)(1)

Professor Schiltz stated that the proposed addition to Rule 4(a)(1) dealt with appeals from orders granting or denying an application for a writ of error *coram nobis*. He explained that it would apply when a petitioner has completed his or her prison sentence but is still under some sort of official restraint. He pointed out that there was a split among the circuits as to whether an appeal in such a case is governed by the time



limits applicable in civil cases (Rule 4(a)), or by the shorter limits applicable in criminal cases (Rule 4(b)). The advisory committee, he said, saw no reason to require expedited treatment of these cases. Thus, it decided to treat them as civil cases for purposes of Rule 4(a).

Professor Schiltz also pointed out that there was some question as to whether writs of error *coram nobis* still exist. He said that the committee note emphasizes that the advisory committee takes no position on this substantive issue.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 4(a)(5)(ii)

Professor Schiltz said that Rule 4(a)(5)(ii) was being amended because most of the circuits have been following an obsolete committee note, rather than the language of the rule itself. The rule permits a district court to extend the time to file a notice of appeal if: (1) the party seeking the extension files its motion no later than 30 days after expiration of the original 30 days specified in Rule 4(a); and (2) the party shows either excusable neglect or good cause. Only the First Circuit, he said, follows the rule as written. The other circuits hold that the good cause standard applies only to motions brought before expiration of the original 30 days, while the excusable neglect standard applies only to motions brought after the 30 days.

Professor Schiltz said that the advisory committee would amend the rule to make it clear that either standard — excusable neglect or good cause — may be applied to all extension motions, whether they are filed before or after the original 30-day period. He added that this change would also bring the provision for appeals in civil cases into harmony with the provision governing appeals in criminal cases.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 4(a)(7)

Professor Schiltz reported that proposed amendments to Rule 4(a)(7), dealing with entry of judgment for purpose of appeal, addressed four separate splits among the courts of appeals in interpreting the current rule.

He explained that the basic principle — set forth in FED. R. CIV. P. 54(a) and 58 — is that a judgment that concludes a civil case must be entered on a separate piece of paper, and it is not effective until so entered. This, he explained, is, in essence, a notice provision that lets the parties know that the time for filing motions or notices of appeals

has begun to run. But, he added, the civil rules define “judgment” very broadly to include any order from which an appeal lies. Thus, the question arises as to whether the order granting or denying a post-trial motion must itself be set forth on a separate piece of paper.

The first split among the circuits relates to whether FED. R. APP. P. 4(a)(7) merely incorporates the separate document requirement of the civil rules or imposes its own, independent separate-document requirement. The advisory committee’s proposed amendment would make it clear that the requirement for a separate document will be governed exclusively by the civil rules. Accordingly, judgments and orders need be set forth on separate pieces of paper only when required by FED. R. CIV. P. 54(a) and 58.

As to the second split of opinion, the current rule appears to provide that if a judgment is not entered on a separate document, the parties have no time limit for taking an appeal. This raises a serious practical problem because in many cases a separate document is not in fact entered by the clerk. Thus, there is no cut-off time for filing an appeal. As a result, for example, prisoner cases and other cases that have been disposed of by the district courts without a separate judgment document are still potentially active.

Professor Schiltz noted that the First Circuit has dealt with this particular problem by providing that the parties are deemed to have waived their right to a separate judgment document after three months. He said that the advisory committee liked this approach and had adopted it with modification. Accordingly, the proposed amendment provides that if the clerk does not enter a judgment on a separate document, the rule will deem a separate document to have been entered 150 days after a judgment or order has been entered in the civil docket. This, he explained, effectively gives the parties an outside limit of six months in which to take an appeal, *i.e.*, 150 days plus the original 30 days.

Professor Schiltz noted that the third split among the circuits deals with whether the appellant may waive the separate document requirement, even if the appellee objects. In other words, can the appellee force the appellant to go back to the district court and obtain a separate piece of paper in order to take an appeal? The advisory committee’s proposed amendment would codify the Supreme Court’s decision in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), and make it clear that the decision to waive entry of a judgment or order on a separate piece of paper belongs to the appellant alone.

The fourth circuit split is over whether an appellant who waives the requirement of a separate document must appeal within 30 days after entry of the judgment that should have been set forth in a separate document, but was not. Professor Schiltz pointed out that the advisory committee’s proposed amendment adopts the view that there is no time limit.

One of the members suggested that the committee note should address specifically the issue of whether the amendment will have retroactive effect. Other members suggested that a transition rule should be considered.

Judge Niemeyer said that the proposed amendments could have broad ramifications. He said that key issues flow from the definition of a judgment — such as when a judgment can be enforced and when it can be appealed. He argued that there is an important linkage between these two purposes. But, he said, the proposed amendments deal only with judgments for purposes of appeal, and not with the validity of judgments for other purposes. As a result, the rule could lead to unintended consequences, since court orders would be considered judgments for some purposes, but not others. He said that it would be best if these issues were addressed through the civil rules.

Judge Garwood and Professor Schiltz responded that the proposed amendments did not attempt to address the problems of enforcement. These problems, they said, exist already. The rule would provide that after 150 days a separate piece of paper is deemed to have been filed. It is only a timing rule, nothing else.

One of the members pointed out that if a separate piece of paper has not been entered following a trial judge's decision on a matter, the judge may not in fact have wanted to make a final disposition of a case. The judge's action may be ambiguous. He argued that the appellant should be required to return to the district court, to ask the trial judge to make his or her intent clear, and to seek a separate judgment document.

Another member added that the separate document requirement of FED. R. CIV. P. 58 is a sound procedural requirement. The problem, he said, is that the rule is often ignored in practice by lawyers and judges. Therefore, the proposed 150-day rule is a good, practical idea. But, he added, a great many potential complications may arise. Moreover, there are no perfect answers to all the problems that can be foreseen. In essence, he said, the judgment provisions in the civil rules were designed for civil rules purposes. They simply do not interface cleanly with the appellate rules. Accordingly, the Advisory Committee on Civil Rules should take a close look at the problems raised by judgments in civil cases.

Another member pointed out that the proposed amendment to FED. R. APP. P. 4(a)(7) attempts to address finality of a judgment for purposes of filing a notice of appeal. But there are other consequences in the trial court, particularly with regard to post-trial motions. He said that the particular problems that the proposed amendment attempts to address may not be sufficiently urgent or compelling to justify going forward with changes at this point. Moreover, he added, the committee should not publish a rule that solves some problems, but not others. Therefore, he suggested that further study be undertaken to sort out the complex interfaces between the civil and appellate rules.

Judge Scirica asked whether the Advisory Committee on Civil Rules would be amenable to studying FED. R. CIV. P. 58 in light of the foregoing discussions. Judge Niemeyer replied that the advisory committee would be pleased to study the issues and work closely on the matter with the Advisory Committee on Appellate Rules. Yet he questioned whether the civil advisory committee could come to an appropriate resolution of the issues by the time of its April 2000 meeting.

Another member suggested that the Advisory Committee on Civil Rules attempt to identify the various problems raised by the interface of the two sets of rules, either before or after publication of the proposed amendments to FED. R. APP. P. 4(a)(7). Another member recommended that the proposed amendments be published, but that the two advisory committees begin working together immediately on the problems and perhaps resolve them by the next meeting of the Standing Committee.

Professor Schiltz responded that the issues were so complex that it could take years to resolve all the possible anomalies. In the meantime, he recommended that the proposed amendments be published, for they would resolve real, immediate problems. He emphasized that there were thousands of cases still pending in the district courts that should be closed.

Judge Scirica suggested that the Standing Committee defer taking a vote on Rule 4(a)(7) until after the luncheon intermission, during which he would confer on the matter with Judge Garwood and Judge Niemeyer.

**Following the luncheon intermission, Judge Scirica announced that Judge Garwood had agreed to save the amendments to Rule 4(a)(7) for additional discussion at the June 2000 meeting of the Standing Committee.**

Judge Scirica pointed out that the proposed amendments would not be published in any event until August 2000. Therefore, there was time for the Advisory Committee on Civil Rules to address the pertinent judgment issues at its April 2000 meeting and report back at the June 2000 Standing Committee meeting. He also suggested that the Standing Committee might appoint an ad hoc subcommittee to consider, as a possible long range project, some of the interfaces among the various sets of federal rules.

#### FED. R. APP. P. 4(b)(5)

Professor Schiltz pointed out that FED. R. CRIM. P. 35 provides that in a criminal case a court may correct a sentence for mathematical or technical errors, but only if it acts within seven days after imposition of the sentence. He said that all the circuits

agree that the district court lacks jurisdiction to correct a sentence after the seventh day has passed.

He added, though, that the circuits disagree as to whether the filing of a motion under FED. R. CRIM. P. 35(c) to correct a sentence tolls the time to appeal the underlying judgment of conviction. FED. R. APP. P. 4(b)(3)(a) specifically lists the motions that toll the time for appeal, but it makes no mention of FED. R. CRIM. P. 35(c)

The proposed amendment would state clearly that a motion to correct a sentence under FED. R. CRIM. P. 35(c) does *not* toll the time for filing a notice of appeal.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 5(c)

Professor Schiltz stated that the proposed amendment to Rule 5(c) would correct a typographical error, occurring during the 1998 restyling of the Federal Rules of Appellate Procedure, that inadvertently narrowed the requirements for the form of a petition for permission to appeal and the answer to a petition or cross-petition for permission to appeal. The cross-reference to Rule 32(a)(1) would be changed to Rule 32(c)(2).

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 15(f)

Professor Schiltz reported that the proposed amendment to Rule 15(f) was designed to treat premature petitions seeking review of agency decisions in the same manner as premature petitions appealing trial court decisions. He explained that the filing of post-judgment motions under Rule 4(a)(4)(A) tolls the time to appeal until the court disposes of them. If a notice of appeal is filed while a post-trial motion is pending, the notice is held in abeyance until the court grants or denies the last such remaining motion.

In the context of a review or enforcement of an agency order, however, a notice of appeal filed while there are post-decision proceedings pending in the agency may be considered a nullity. The proposed amendment would hold the notice of appeal in abeyance until the agency disposes of the last petition for rehearing, reopening, or reconsideration.

Judge Garwood pointed out that the rule does not specify when, or whether, an agency decision is final or appealable. It simply provides that if a notice of appeal is filed, it is allowed, but held in abeyance.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 24(a)

Professor Schiltz explained that the two proposed amendments to Rule 24(a) would resolve conflicts between the current rule and the Prison Litigation Reform Act.

Rule 24(a)(2) specifies that a litigant need not prepay the filing fee. The Act, however, requires a prisoner to pay filing fees, at least in installments. The proposed amendment would provide that a party may proceed on appeal without prepaying fees, “unless the law requires otherwise.”

Rule 24(a)(3) states that permission to proceed *in forma pauperis*, if granted by the district court, continues in the court of appeals without the need for further authorization. The Act, however, provides that a prisoner must seek permission to continue to proceed *in forma pauperis* in the court of appeals. The proposed amendment would allow a party to continue to proceed *in forma pauperis*, “unless the law requires otherwise.”

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 26(a)(2)

*Related Amendments*

FED. R. APP. P. 4(a)(4)(A)(vi)

FED. R. APP. P. 27(a)(3)(A)

FED. R. APP. P. 27(a)(4)

FED. R. APP. P. 41(b)

Professor Schiltz presented a package of amendments dealing with time computation. He explained that the amendments were designed to eliminate a discrepancy between the rules of appellate procedure, on the one hand, and the rules of civil and criminal procedure, on the other.

FED. R. APP. P. 26(a)(2) provides that Saturdays, Sundays, and legal holidays are excluded in computing any period of time specified in the rules that is less than 7 days. The civil rules and criminal rules, however, provide that Saturdays, Sundays, and legal

holidays are excluded when the time prescribed or allowed in the rules is less than 11 days.

The proposed amendment would align the appellate rules with the civil and criminal rules and prescribe a period of 11 days. Thus, all 7-day and 10-day deadlines in the Federal Rules of Appellate Procedure would be lengthened as a practical matter. The advisory committee had no concern with this outcome, except in the case of three rules.

First, 27(a)(3)(A) currently give parties 10 days to file a response to a motion. With the proposed change in Rule 26(a)(2), parties in the future would have at least 14 days to respond, since Saturdays, Sundays, and legal holidays would no longer be excluded. The advisory committee decided that 14 days is too long a period to allow for filing a response to a motion. Accordingly, it would amend Rule 27(a)(3)(A) to reduce the period prescribed in the rule from 10 days to 7 days.

Second, Rule 27(a)(4) currently gives parties 7 days to reply to a response to a motion. Thus, under amended Rule 26(a)(2), they would have at least 9 days to reply. The advisory committee would amend Rule 27(a)(4) to reduce the time from 7 days to 5 days.

Third, Rule 41(b) states that a court's mandate must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The advisory committee believes that the 7-day period should remain in effect. Therefore, the proposed amendment would substitute the term "7 calendar days" for "7 days."

Finally, the advisory committee would amend Rule 4(a)(4)(A)(vi) to delete a parenthetical that refers to computing a 10-day period by using the Federal Rules of Civil Procedure. The parenthetical would become superfluous in light of the proposed amendment to FED. R. APP. P. 26(a)(2).

**The committee approved the package of proposed amendments on time computation for publication without objection.**

FED. R. APP. P. 27(d)(1)(B)

*Related Amendments*

FED. R. APP. P. 32(a)(2)

FED. R. APP. P. 32(c)(2)(a)

Professor Schiltz reported that the proposed amendments to Rules 27 and 32 would prescribe the color of the cover of certain documents. The current Rule 32 requires that covers of a specified color must be used on briefs and separately bound appendices. The rule, though, does not require covers for other kinds of documents.

The proposed amendment to Rule 32(a)(2) would require that the cover of a supplemental brief be tan. A cover is not required for motions or other papers. The proposed amendments to Rule 27(d)(1)(B) and 32(c)(2)(A) would provide that if a cover is in fact used, it must be white.

**The committee approved these proposed amendments for publication without objection.**

FED. R. APP. P. 28(j)

Professor Schiltz pointed out that Rule 28(j) allows a party to notify the court by letter of pertinent and significant authorities that come to its attention after its brief has been filed. The letter, however, must provide reasons “without argument.” He explained that parties commonly include arguments in their letters, and the distinction between statements and arguments is nearly impossible for clerks’ offices to enforce.

Professor Schiltz said that the proposed amendment would delete the prohibition on argument, but it would limit the body of the letter to a maximum of 250 words. The committee note explains that all words found in footnotes count toward the 250 word limit.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 31(b)

Professor Schiltz said that the current Rule 31(b) inadvertently implies that parties who are not represented by counsel need not be served with briefs. The proposed amendment would correct that mistake and require service on unrepresented parties.



**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 32(a)(7)(C) and FORM 6

Professor Schiltz reported that the proposed new form was a suggested certificate of compliance with the type-volume limitation, typeface requirements, and type style requirements of Rule 32(a)(7). The proposed amendment to Rule 32(a)(7) would provide that parties are not required to use the new form, but if they do use Form 6, the court must accept it.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 32(d)

Professor Schiltz stated that the proposed amendment to Rule 32(d) would add a requirement that papers filed with the court be signed. He explained that the rule was much simpler than FED. R. CIV. P. 11. The advisory committee did not see the need to incorporate into the rule the good faith requirements of the civil rule because the courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions.

**The committee approved the proposed amendment for publication without objection.**

FED. R. APP. P. 44

Professor Schiltz noted that 28 U.S.C. § 2403(a) provides that when the constitutionality of a federal statute is challenged and the United States is not a party, the court must notify the Attorney General of the challenge. Under 28 U.S.C. § 2403(b), the court must notify the attorney general of a state when the constitutionality of a state statute is challenged.

Professor Schiltz pointed out that FED. R. APP. P. 44 implements § 2403(a), but not § 2404(b). The advisory committee, accordingly, would add a new Rule 44(b) requiring notice to state attorneys general.

**The committee approved the proposed amendment for publication without objection.**

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Morris presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of December 3, 1999. (Agenda Item 6)

Judge Duplantier introduced the advisory committee's new reporter, Professor Jeffrey Morris of Dayton University Law School. He pointed out that Professor Alan N. Resnick, had relinquished the post of reporter and had been appointed by the Chief Justice as a member of the committee.

Judge Duplantier reported that the advisory committee had no matters to present for action. He noted that the committee had published amendments to eight bankruptcy rules, and it would consider the public comments at its March 2000 meeting. He added that, to date, the committee had received very few comments, and it had canceled the scheduled public hearing.

Professor Morris reported that the advisory committee was working with the Advisory Committee on Appellate Rules to devise a procedure for notifying parties in a bankruptcy case that there has been a compromise or settlement of a bankruptcy appeal. He explained that the bankruptcy rules require that the bankruptcy clerk, or some other person as the court may direct, give notice of a compromise or settlement to all creditors. This is sound policy because a compromise or settlement may have an impact on creditors and all other parties in interest. The bankruptcy rules, however, do not reach compromises or settlements made at the appellate level.

Professor Morris said that the advisory committee was generally of the view that settlements at the appellate level should be handled in the same manner as settlements at the bankruptcy court level. He suggested that a simple reference in the appellate rules to the pertinent bankruptcy rules would probably take care of the problem.

### *Pending Omnibus Bankruptcy Legislation*

Professor Morris reported that the House of Representatives had passed omnibus bankruptcy reform legislation. He said that the breadth of the legislation was substantial, noting that the House bill was 151 pages long. He added that the Senate bill, which was almost as long, had been reported out of committee and was being subjected to a number of floor amendments. He said that a cloture vote was expected in the Senate by the end of January 2000.

Professor Morris pointed out that there were several provisions in the legislation that would direct, in one form or another, the advisory committee, the Judicial Conference, or the Supreme Court on a rules matter. He noted, for example, that both

the House and Senate bills proclaim a sense of Congress that FED. R. BANKR. P. 9011 should be amended to bring within its reach the information set forth in the debtor's schedules and statements. He pointed out that another provision, contained in the Senate bill, would authorize the Supreme Court to promulgate a rule establishing a fee schedule for bankruptcy petition preparers.

Professor Morris said that the bills contain significant proposals regarding small business Chapter 11 cases that will require rules changes. The legislation moreover, explicitly requires the advisory committee to approve forms for these cases.

He noted that the bills also direct the committee to include specific rules dealing with providing notice to governmental units. He pointed out that these provisions reflect input given to the Congress by affected governmental units. He added, however, that in September 1999 the Judicial Conference had approved proposed amendments to FED. R. BANKR. P. 5003 that would provide better notice to governmental units while imposing less burdensome obligations on the bankruptcy clerks. If approved by the Supreme Court, the amendments would take effect on December 1, 2000.

Professor Morris pointed out that the many substantive changes in the legislation will require the advisory committee to propose new rules and forms. He mentioned, for example, that the bills would impose means-testing requirements for debtors, require them to attend credit counseling and financial management programs, make changes in the way support claims for children and spouses are treated, and create new claim priorities.

#### *Financial Disclosure*

Judge Duplantier reported that the advisory committee had considered the reference from the Standing Committee of a proposal to adopt a uniform rule requiring disclosure of financial interests patterned on FED. R. APP. P. 26.1. He said that the advisory committee had concluded that a uniform rule would indeed be appropriate and would operate well in adversary proceedings. But, he added, apart from the context of discrete litigation between disputing parties, it may be difficult to administer financial disclosure in bankruptcy cases generally because of the volume of creditors in many bankruptcy cases and the difficulty of identifying all pertinent relationships.

Judge Duplantier said that it was his own personal view that financial disclosure was not really a matter for the rules committees at all. He argued that it was an issue of judicial disqualification, not a rule of procedure. Accordingly, it could be handled more effectively by a Judicial Conference resolution and the issuance of an Administrative Office form that parties would be required to file upon entry in a case. He said that this administrative approach could be effectuated very quickly, without waiting the three years or so that it takes for the Rules Enabling Act process to be completed. He added

that there was precedence for this approach, since parties are presently required to identify to the court any related litigation or cases in which they are involved.

Judge Scirica agreed that the matter was not strictly a rule of procedure, but he noted that there were significant political considerations to take into effect. He said that the matter would be discussed in greater detail later in the meeting, with Judge Amon, chair of the Codes of Conduct Committee, participating by telephone.

#### REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer and Professor Cooper presented the report of the advisory committee, as set forth in Judge Niemeyer's memorandum and attachments of December 8, 1999. (Agenda Item 7)

Judge Niemeyer reported that the advisory committee's package of amendments to the discovery rules had been approved by the Judicial Conference and transmitted to the Supreme Court.

He noted that the Chief Justice had not acted on the recommendation for appointment of an ad hoc committee to address mass torts. Therefore, the advisory committee will itself take another look at FED. R. CIV. P. 23 to determine whether any further amendments to the class action rule are advisable. Judge Lee Rosenthal would chair an ad hoc subcommittee in this endeavor. The advisory committee would also coordinate its efforts with other committees of the Judicial Conference.

Judge Niemeyer reported that the advisory committee had embarked on a long-term project to develop a special set of simplified rules of procedure that would permit parties in certain cases to have their disputes heard and resolved quickly and cheaply. He added that Professor Cooper had prepared a first draft of such rules for discussion and that Sheila Birnbaum would chair an ad hoc subcommittee to consider them.

Professor Cooper reported that the standing committee at its June 1999 meeting had approved the advisory committee's proposed amendment to FED. R. CIV. P. 5 prohibiting the filing of initial disclosures and discovery materials until they are used in a proceeding (or the court orders otherwise). At the same time, the Standing Committee asked the advisory committee to report back regarding the impact of the amended rule on: (1) defamation privileges under state law; and (2) public access to discovery materials.

Professor Cooper noted that discovery materials are not presently filed in most district courts, even though local rules that bar filing may be invalid. He added that the advisory committee's research had shown that there have been no practical problems

and no case law regarding privileges. In particular, there is no indication that privileges have been affected by the fact that materials are filed with the court or not. The advisory committee, thus, concluded that there was no need to consider privilege questions further and no need to change the pending amendment to Rule 5(b).

With regard to public access, the advisory committee had focused its attention on protective orders, but it also explored issues relating to preserving discovery materials and providing access to them. The committee found that there was no indication that public-access problems existed in the districts that currently bar the filing of discovery materials. Accordingly, it concluded that there was no reason to explore these issues further or to amend the national rules to address them.

#### REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of December 2, 1999. (Agenda Item 8)

Judge Scirica reported, by way of background, that the Standing Committee had been involved since 1991 in a comprehensive project, initiated by Judge Keeton, to clarify and improve the federal rules as a whole. As a result, the Federal Rules of Appellate Procedure were totally restyled effective December 1, 1998. The criminal rules, he said, were next in line for restyling, and a package of restyled rules would be published for public comment in August 2000. No plans, however, had been made for addressing the other sets of rules.

Judge Scirica pointed out that the thrust of the restyling efforts was to improve the language and organization of the rules without making substantive changes. Nevertheless, as part of the review process, the advisory committees inevitably discover ambiguities, anomalies, anachronisms, and mistakes in the rules that require them to recommend changes that are more than purely stylistic. Moreover, the committees, as part of their normal processes, identify substantive changes that should be pursued.

Judge Scirica said that the Advisory Committee on Criminal Rules had accomplished a great deal and had produced an excellent product. He said that it was important to consider the appropriate manner in which to present the proposed changes to the public, since most will be stylistic, but some will be substantive and potentially controversial. He added that the advisory committee had clearly identified and labeled all potentially substantive changes.

Judge Davis reported that the advisory committee was presenting restyled versions of Rules 1-31 to the Standing Committee at the present meeting for approval to

publish. Rules 32-60 would be presented for publication at the June 2000 Standing Committee meeting. The entire body of restyled criminal rules would then be published for public comment in August 2000.

Judge Davis explained the process that the advisory committee had followed in restyling the rules. First, he said, the Standing Committee's style committee and style consultant reviewed and rewrote all 60 rules, presenting them to the advisory committee for review in December 1998. The advisory committee then divided itself into two subcommittees, each of which carefully reviewed and edited half the rules, making further changes and improvements. The Department of Justice's representative obtained input from career prosecutors in the Department, and the magistrate judge member of the advisory committee consulted with about 40 magistrate judges during the restyling process. The full advisory committee independently then reviewed all the recommendations of the two subcommittees.

Judge Davis thanked Judge James A. Parker, chairman of the standing committee's style subcommittee. He pointed out that Judge Parker had attended the meetings of the advisory committee, in person or by telephone, and had worked very hard on the restyling of the rules. He also thanked the other members of the style subcommittee, Judge William R. Wilson, Jr., Professor Hazard, and Mr. Spaniol.

Judge Davis pointed out that the advisory committee had focused on a number of key points.

First, it agreed upon standard, uniform terms and phrases, generally following the *Guidelines for Drafting and Editing Court Rules*.

Second, it attempted to avoid any unforeseen substantive changes, and it identified clearly in the committee notes any changes that might be considered substantive.

Third, it deleted provisions that were no longer necessary.

Fourth, it reorganized several some of the rules to make them easier to read and apply, and it moved some sections of rules to other locations.

Fifth, it made major substantive changes in a few rules.

In addition to its action on the restyling project, the advisory committee had approved a number of substantive changes over the course of its last several meetings, but held them back in anticipation of including them for publication in the package of restyled rules.

Judge Davis and Professor Schlueter proceeded to described the proposed changes in each of the first 31 rules.

FED. R. CRIM. P. 1

Professor Schlueter pointed out that the current Rule 1 (Scope and Definitions) is only eight lines long and includes a cross reference to Rule 54, which also contains definitions. The advisory committee decided to combine and reorganize Rules 1 and 54. In the process, it deleted a number of provisions in the current rules because they have been superseded or are no longer needed.

He reported that the advisory committee had spent a good deal of time examining the use of the terms “court,” “judge,” and “magistrate judge.” The terms “court” and “judge” in the current rules are confusing, and they are often used interchangeably. The term “magistrate judge,” as currently defined in Rule 54, includes not only a United States magistrate judge, but also a district judge, court of appeals judge, Supreme Court justice, and state and local officers who may be authorized to act in a particular case.

As restyled, Rule 1 would define a “magistrate judge” as a United States magistrate judge only. State and local judicial officers are not included in the revised definition. New Rule 1(c) would provide that when the rules authorize a magistrate judge to act, any Article III judge may also act.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 2

Professor Schlueter noted that the title of Rule 2 (Purpose and Construction) was being changed to “Interpretation.” He said that the proposed changes in the text of the rule were minor and purely stylistic.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 3

Professor Schlueter pointed out that Rule 3 (Complaint) was the first of several rules dealing with initial proceedings for persons charged with an offense. He said that the restyled rules reflect actual practice by stating a preference for proceeding before a federal judge. Law enforcement authorities, thus, could proceed before a state or local judicial officer if a federal judicial officer were not reasonably available.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 4

Professor Schlueter said that the current Rule 4 (Arrest Warrant or Summons Upon Complaint) provides that if the defendant fails to appear in response to a summons, the court must issue a warrant. The revised rule would provide that a judge in such circumstances may — and upon request of the government must — issue a warrant.

The revised rule would delete the provision in current Rule 4(b) that a finding of probable cause may be based on hearsay evidence. The provision is not needed because the matter is covered in the Federal Rules of Evidence.

The current Rule 4(b)(3) provides that the arresting officer is required to inform the defendant of the offense charged and that a warrant exists only if the officer does not have a copy of the warrant. The revised rule would require the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists.

Professor Schlueter reported that Rule 9(c)(1), which specifies the manner of serving a summons on an organization, had been revised and relocated to new Rule 4(c)((3)(C). As amended, the rule would provide that in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

A change would also be made in new Rule 4(c)(4). Under the current rule, an unexecuted warrant must be returned to the judicial officer who issued it. Under the amended rule, at the government's request, an unexecuted warrant may be returned and canceled by any magistrate judge.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 5

Professor Schlueter pointed out that the revised Rule 5 (Initial Appearance) expresses a preference for proceeding before a federal judicial officer. Rule 5(a)(1) would require the person making the arrest to bring the defendant “promptly” before a magistrate judge, rather than the “nearest available magistrate judge.”



Judge Davis reported that the advisory committee had long been considering a number of proposals to allow video conferencing of initial appearances, many of them requested by judges in courts along the Mexican border. He said that the committee had voted to permit video conferencing of initial appearances if the defendant waives the right to be present in open court. The change is reflected in proposed new Rule 5(d), which gives the court discretion to use, or not to use, video conferencing. He explained that the advisory committee had been persuaded that there was a real need for the provision and that the technology had reached the point where it was reliable. He added that there had been some sentiment on the advisory committee to dispense with the need for the defendant's consent, but the committee decided to proceed cautiously in the matter.

**The committee approved the proposed revised rule for publication without objection.**

#### FED. R. CRIM. P. 5.1

Professor Schlueter pointed out that Rule 5.1 currently provides that a magistrate judge may continue a preliminary hearing only with the consent of the defendant. If the defendant does not consent, only a district judge may grant a continuance. This provision, he said, reiterates the limitation on magistrate judge authority set forth in 18 U.S.C. § 3060(c).

Professor Schlueter explained that the advisory committee had recommended a change in the underlying statute upon which the rule is based. But the Standing Committee rejected that approach. Instead, it recommitted the matter to the advisory committee with the suggestion that it amend Rule 5.1 and rely on the supersession clause of the Rules Enabling Act to override the statute.

The advisory committee then considered the matter anew and decided that it was not worth pursuing a change in the rule. The Standing Committee agreed, but the Executive Committee of the Judicial Conference asked the rules committees to proceed with the proposed change in the rule.

Thus, the revised Rule 5.1(c) would allow a magistrate judge to grant a continuance of a preliminary hearing. This will create a conflict with the statute and invoke the supersession clause of the Rules Enabling Act. Nevertheless, the subject matter of the proposal is not at all controversial.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 6

Professor Schlueter said that the proposed changes to Rule 6 (Grand Jury) were non-controversial. The last sentence of current Rule 6(b)(1) would be eliminated. It provides that grand jury challenges must be made before the oath is given to the jurors. The advisory committee, after research, could not discern why the provision was contained in the rule and concluded that it must be an anomaly.

Professor Schlueter pointed out that the last sentence of current Rule 6(e)(2), providing that a knowing violation of Rule 6 may be punished as a contempt of court, had been enacted by Congress. Its location is misplaced, however, since it is contained in a paragraph dealing only with the secrecy of grand jury proceedings. The advisory committee concluded that Congress must have meant the provision to apply to any violation of Rule 6 and, therefore would move it to new paragraph (e)(7).

Professor Schlueter said that Rules 6(e)(3)(D)(iii) and (iv) had been added, at the request of the Department of Justice, to include military officials and Indian tribal officials within the list of people with whom United states attorneys may share grand jury matters.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 7

Professor Schlueter noted that Rule 7 (Indictment and Information) had one minor change. The term "hard labor," found in the current Rule 7(a) would be deleted since it no longer appears in federal statutes.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 8

Professor Schlueter said that there were no substantive changes in revised Rule 8 (Joinder of Offenses or Defendants).

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 9

Professor Schlueter pointed to two changes in Rule 9 (Arrest Warrant or Summons on an Indictment or Information). First, revised Rule 9(a) would give a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. If, however, the government requests issuance of a warrant, the judge must issue one.

Second, the advisory committee would eliminate from current Rule 9(b)(1) the authority of a court to fix the amount of bail on a warrant. The provision is inconsistent with the Bail Reform Act.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 10

Professor Schlueter pointed out that Rule 10 now provides that an arraignment must be conducted in open court with the presence of the defendant. Amended Rule 10(a) would allow the defendant to waive a personal appearance in writing. Amended Rule 10(b) would allow the arraignment to be conducted by video conferencing upon the defendant's consent. Thus, one new provision would allow the defendant to waive an arraignment entirely, and the second would allow the defendant to waive the right to have the arraignment conducted in open court.

Professor Schlueter reported that some members of the advisory committee would prefer to have every defendant be present in open court for an arraignment and would not personally authorize waivers in their own cases. Nevertheless, they believed that the rule should be published for comment.

One participant argued that he would be willing to publish a rule that dispensed with the requirement that the defendant consent to video conferencing an arraignment. He said that video conferencing should be encouraged because the technology is very good and the procedure saves considerable travel time and expenses. Mr. Rabiej responded that the advisory committee had published the proposed amendment several years ago without a requirement of consent. The public defenders objected to it because it would deprive them of an opportunity to meet with their clients in person and would shift operating costs from the marshals to the defenders.

Another participant suggested that the advisory committee include language in the publication expressly inviting public comment on whether the consent of the defendant should be required. Judge Davis agreed to bring the suggestion to the attention of the advisory committee.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 11

Judge Davis reported that Rule 11 (Pleas) had been reorganized and its provisions placed in logical order. He pointed out that the list of matters of which the court must inform the defendant would be expanded to include fines and special assessments. He noted that this change would reflect the existing case law.

Judge Davis noted that revised Rule 11(c) would add to the list of plea agreement options an agreement by the government that it will not bring, or will move to dismiss, other charges. He explained that this is common practice for the government.

Judge Davis pointed out that revised Rule 11(e) had been relocated from Rule 32. It would provide that the defendant may not withdraw a plea after the court imposes sentence.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 12

Judge Davis reported that the advisory committee had decided not to retain the provision in current Rule 12 (Pleadings and Pretrial Motions) referring to the abolition of all other pleas, demurrers, and motions to quash. It is no longer necessary.

Judge Davis said that the current Rule 12(c) authorizes the court to set a time for making motions, unless otherwise provided by local rule. The advisory committee would delete the local rule exception because judges should be encouraged to set deadlines for motions.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 12.1

Judge Davis said that two changes would be made in Rule 12.1 (Notice of Alibi Defense). First subdivisions (d) and (e) would be reversed in order to improve the organization of the rule. Second, the amended rule would add a new requirement that the parties, in providing the names and addresses of alibi and rebuttal witnesses, also provide the phone numbers of those witnesses.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 12.2

Judge Davis reported that the advisory committee had made a significant change in Rule 12.2 (Notice of Insanity Defense; Mental Examination). The committee would allow the government to have a psychiatric examination of a defendant in a capital case if the defendant gives notice of an intention to use a psychiatric defense at the sentencing proceeding. The current rule requires a defendant to provide notice to the government if he or she intends to offer expert mental condition testimony only as to the question of guilt. Revised Rule 12.2(b) would expand that requirement to the sentencing phase in a capital case.

Revised Rule 12.2(c)(4) deals with admission of a defendant's statements made in the course of an examination. It would provide that the admissibility of the defendant's statements in a capital sentencing proceeding would be triggered only by the defendant's introduction of expert evidence.

Revised Rule 12.2(d) would provide that the sanction for a defendant not giving notice or failing to submit for an examination is exclusion of the defendant's own witnesses. Judge Davis noted that this result is consistent with current case law.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 12.3

Judge Davis pointed out that the proposed change in revised Rule 12.3 (Notice of Public Authority Defense) was parallel to a proposed change in Rule 12.1, dealing with alibi defenses. It would require parties to provide the telephone numbers of any witnesses disclosed under the rule.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 13

Judge Davis said that only stylistic changes had been made in revised Rule 13 (Joint Trial of Separate Cases).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 14

Judge Davis said that only stylistic changes had been made in revised Rule 14 (Relief from Prejudicial Joinder).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 15

Professor Schlueter noted three changes in revised Rule 15 (Depositions).

First, the word “data” would be added to the list of items that the court may require the deponent to produce at a deposition. Professor Schlueter pointed out that the same change was also being made in revised Rule 17(c), dealing with subpoenas.

Second, revised Rule 15(d) would broaden the government’s responsibility to pay for depositions when the defendant is unable to bear the expenses.

Third, revised Rule 15(f), governing use of depositions as evidence, had been reorganized. Professor Schlueter pointed out that there may be no need for the provision at all, and the advisory committee might recommend at the June 2000 Standing Committee meeting that it be dropped. Nevertheless, Professor Schlueter asked the committee to approve the rule for publication as written, subject to any further recommendations that the advisory committee might make in June.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 16

Professor Schlueter reported that Rule 16 (Discovery and Inspection) had been completely reorganized. The only change that might be considered substantive, he said, was occurred in Rule 16(b)(1)(A)(ii), where the reference to items that the defendant “intends to introduce as evidence” would be replaced by items that the defendant “intends to use.”

One participant suggested that the heading of paragraph (b)(1), “discloseable information” was inelegant and should be reconsidered.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 17

Judge Davis said that there was one change of note in revised Rule 17 (Subpoena). The term “data” would be added to the items that a court may direct a witness to produce.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 17.1

Judge Davis pointed to one change in revised Rule 17.1 (Pretrial Conference). The last sentence of the current rule states that the rule cannot be invoked if a defendant is not represented by counsel. The advisory committee would delete the sentence. Thus, the court may hold a pretrial conference if the defendant is not represented.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 18

Judge Davis reported that there were no changes of substance in revised Rule 18 (Place of Prosecution and Trial).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 19

Judge Davis noted that Rule 19 had already been rescinded.

FED. R. CRIM. P. 20

Judge Davis reported that there were no significant changes in revised Rule 20 (Transfer for Plea and Sentence). A technical change would be made in revised Rule 20(d)(2) to make the clerk’s duties parallel in juvenile and non-juvenile cases. In both categories of cases, the clerk must send the file, or a certified copy, to the clerk in the transferee district.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 21 and 22

Judge Davis said that Rule 21 (Transfer for Trial) and Rule 22 (Time to File a Motion to Transfer) had been combined into a new Rule 21 without any substantive changes.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 23

Judge Davis reported that there were no significant changes proposed in Rule 23 (Jury or Nonjury Trial). He pointed out that the term “just cause” had been changed in revised Rule 23(b)(3) to “good cause,” in order to conform to the standard terminology used elsewhere in the rules.

**The committee approved the proposed revised rule for publication without objection.**

## FED. R. CRIM. P. 24

Professor Schlueter pointed to two changes in Rule 24 (Trial Jurors). He noted that in Rule 24(a) the advisory committee had removed language from the current rule implying that a defendant, even if represented by counsel, may personally question jurors. He added that the advisory committee believed that the revision reflected current practice, which allows defendants to question jurors only if they proceed *pro se*.

Professor Schlueter reported that a major substantive change was being proposed in Rule 24(c). The revised rule would increase the number of peremptory challenges for the government to the same number allowed the defendant. He pointed out that the number of peremptory challenges had been considered previously by the Standing Committee. In 1991, he said, the committee had authorized publication of a proposed amendment that would have reduced the number of peremptory challenges for the defendant from 10 to 6. The proposal attracted substantial opposition during the public comment period, and it was eventually withdrawn.

Introduced in 1997 a provision in proposed omnibus crime control legislation would have equalized the number of peremptory challenges at 10 for both the defendant and the government. On behalf of the Judicial Conference, the Administrative Office urged the Congress not to amend the statute, but to leave the matter to the rules process. As a result, the advisory committee placed the issue on its agenda, and it voted to approve an amendment to Rule 24 fixing the number of peremptories at 10 for each side. That proposed amendment has been included with the restyled rules package.



Professor Schlueter said that there was some sentiment in the advisory committee for fixing the number of peremptory challenges at 8 per side, rather than 10. Three members of the Standing Committee voiced their agreement with this alternative, and they pointed to the extra costs and court time resulting from allowing 20 peremptory challenges, rather than 16. Other participants had argued that 6 peremptory challenges were sufficient and that there was no compelling reason to make any change in the current rule.

Professor Schlueter said that the advisory committee had been persuaded that the matter should be addressed through the Rules Enabling Act process, rather than direct statutory action. Judge Davis suggested that statutory action was likely at some point, but he added that the advisory committee had been persuaded as a matter of basic policy that there should be equality between the parties in the number of peremptory challenges.

One participant recommended that the committee publish the proposed amendment, increasing the number of peremptory challenges for the government, in order to stimulate public comment on the issue. Others replied, however, that a single controversial provision such as this could endanger approval of the entire package of restyled rules.

One member suggested that Rule 24(b)(1), which refers to peremptory challenges in “a crime punishable by death” be narrowed to apply only in cases when the government actually seeks the death penalty. Judge Davis agreed to make the suggested change. Another participant added that the language of the headings to paragraphs (b)(1), (2), and (3) should be revised to read: “capital cases,” “felony cases,” and “misdemeanors.”

**Professor Hazard moved to address the issue of peremptory challenges separately and delete it from the rest of the package of restyled rules.**

Judge Scirica said that it was his understanding that the committee at its June 2000 meeting would address the issue of how to package and present the restyled rules for publication. He pointed that inclusion of controversial provisions raises some doubt as to whether the revised rules can truly be called a restyling project. He suggested that the committee defer until June making any decision on whether to include the proposed peremptory challenge amendment in the restyled package or to publish it separately.

**Judge Kravitch moved to adopt the proposal of the advisory committee that the number of peremptory challenges be fixed at 10 for each side.**

**Judge Tashima moved to fix the number of peremptory challenges at 8 per side.**

**Chief Justice Veasey moved to table the issue until the June 2000 committee meeting.**

**Professor Hazard moved to approve the restyled version of Rule 24, but without any change in the number of peremptory challenges.** He added that the matter could be taken up again at the June meeting. By that time, the advisory committee might undertake additional research, and the staff might get an updated reading on the legislative outlook.

**Judge Scirica announced that, by consensus, all motions would be withdrawn.**

He called for a vote on approving Rule 24 with no change in the current number of peremptory challenges, but inviting the advisory committee to make further recommendations at the June 2000 meeting.

**The committee approved the proposed revised rule, without making any changes in the number of peremptory challenges, for publication without objection.**

FED. R. CRIM. P. 25

Professor Schlueter reported that the only notable change in revised Rule 25 (Judge's Disability) is set forth in Rule 25(b)(2). The current rule provides that a successor judge may grant a new trial for reasons that are "appropriate." The revised rule would provide that a new trial may be approved only if "necessary."

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 26

Professor Schlueter noted two proposed changes in Rule 26 (Taking Testimony). The rule, he said, is generally parallel to FED. R. CIV. P. 43. The revised criminal rule would adopt a recent change made in the civil rule that had eliminated the word "orally" from the requirement that testimony of witnesses be taken in open court. Thus, there would be no question of precluding a witness who uses sign language.

The revised rule, moreover, would also parallel FED. R. CIV. P. 43 by adding a new subdivision (b), authorizing the court to use contemporaneous video presentation of testimony by a witness at a different location. Professor Schlueter pointed out that Confrontation Clause of the Constitution would be satisfied because the revised rule

would require the witness to be “unavailable,” as that term is defined in FED. R. EVID. 804(a).

Several members emphasized that video transmission of witness testimony should be used very sparingly and only in instances when there is simply no other practical way to obtain the testimony. Judge Davis pointed out that the trial judge has discretion in all cases to determine whether remote testimony will be allowed.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 26.1

Professor Schlueter reported that no substantive changes had been made in revised Rule 26.1 (Foreign Law Determination).

**The committee approved the proposed revised rule for publication without objection.**

FED R. CRIM. P. 26.2

Professor Schlueter noted one change in Rule 26.2 (Producing a Witness’s Statement). Under revised Rule 26(c)(2), if a court withholds a portion of a statement over the defendant’s objection, the court must seal the entire statement as a part of the record in case there is an appeal.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 26.3

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 26.3 (Mistrial).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 27

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 27 (Proof of Official Record).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 28

Judge Davis reported that there were no changes, other than stylistic, in Rule 28 (Interpreters).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 29

Judge Davis pointed to a change in revised Rule 29 (Motion for Judgment of Acquittal). He said that under the current rule, the defendant may move for judgment of acquittal within 7 days after the jury is discharged. Under revised Rule 26(c)(1), the defendant could move within 7 days after a guilty verdict or after the court discharges the jury, whichever is less.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 29.1

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 29.1 (Closing Argument).

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 30

Judge Davis pointed out that the advisory committee had improved the language of Rule 30 (Instructions) to clarify what, if anything, an attorney must do to preserve error regarding an instruction or failure to instruct.

**The committee approved the proposed revised rule for publication without objection.**

FED. R. CRIM. P. 31

Judge Davis reported that there were no changes, other than stylistic, in revised Rule 31 (Jury Verdict).

**The committee approved the proposed revised rule for publication without objection.**

#### REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Scirica welcomed Judge Shadur as the new chairman of the Advisory Committee on Evidence Rules.

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum and attachments of December 1, 1999. (Agenda Item 9)

Judge Shadur reported that the advisory committee had completed a review of all the rules of evidence and had made preliminary decisions *not* to amend many of the rules. In addition, he referred the members to the agenda books, in which are listed three long-range projects initiated by the advisory committee. He pointed out that none of the projects is expected to generate proposals for consideration by the standing committee in the near future.

Professor Capra elaborated on the first of these projects. He said that the committee was considering preparing a report or brochure that would inform judges and lawyers of case law under the Federal Rules of Evidence that diverges materially from the text of the rules or the committee notes. He said that there were more than 20 rules where the problem exists. He added that the committee would likely just describe the facts without making judgments or taking positions.

#### ATTORNEY CONDUCT

Professor Coquillette presented the report of the Subcommittee on Attorney Conduct Rules, as set forth in his memorandum of December 7, 1999. (Agenda Item 10)

##### *Background*

He pointed out that the attorney conduct rules project arose largely out of concern over the proliferation of local rules, rather than as a consequence of the dispute between the Department of Justice and the Conference of Chief Justices over regulation of federal attorney conduct. He explained that Congress — during its consideration of the 1988 amendments to the Rules Enabling Act — was displeased that there were thousands of local court rules and that many of them were contrary to statute or the

national rules. Congress, he said, was also concerned that local court rulemaking was undermining the national rules process and the authority of Congress.

Professor Coquillette reported that many local federal court rules govern attorney conduct, and they have been criticized by the American Bar Association and state bar authorities for entrenching on the traditional role of the states in regulating attorney conduct. He added that the American Bar Association had also announced a policy of opposing local rules that are not justified by actual and meaningful differences among courts.

Professor Coquillette explained that the Standing Committee had held two invitational conferences with attorney conduct experts and representatives of bar groups. And it had commissioned seven studies of attorney conduct issues. The committee then considered a wide range of rules options for addressing attorney conduct issues in the federal courts, ranging from doing nothing to promulgating a complete set of national attorney conduct rules. In the final analysis, he said, there now appeared to be a consensus that if any action is to be taken, it should consist of: (1) a single, national “dynamic conformity” rule entrusting attorney conduct matters to the states generally; supplemented by (2) a small core of uniform federal rules addressing problems of particular concern to federal courts, judges, and attorneys.

Professor Coquillette reported that the “McDade Amendment” had made federal government attorneys subject by statute to the conduct requirements of the states and those in local federal court rules. But pending legislation, introduced by Senator Hatch, would effectively repeal the McDade Amendment and authorize the Attorney General to prescribe regulations exempting government attorneys from state coverage if a state law or rule is inconsistent with federal law or interferes with effecting federal investigations and policy. Moreover, other pending legislation, introduced by Senator Leahy, would require the Judicial Conference to file a report with Congress within one year recommending a federal rule governing attorney contacts with represented parties.

#### *Proposed Federal Rule of Attorney Conduct*

Professor Coquillette reported that the Subcommittee on Attorney Conduct Rules had been established in 1999 for two purposes: (1) to see whether the hundreds of inconsistent federal local rules on attorney conduct could be reduced to one or more uniform rules, generally returning most issues to state control; and (2) to address concerns raised in Congress about attorney conduct in the federal courts. He noted that the subcommittee had endorsed a proposed new Federal Rule of Attorney Conduct 1, drafted by Professor Cooper. Essentially, it would leave the regulation of attorney conduct to the states, except for the control of procedure in the federal courts. He pointed out that the subcommittee’s draft had been approved with only one dissent. The

Department of Justice's representative, he said, had voted against the draft, not because she was opposed to it, but because it did not go far enough to protect federal interests.

Professor Coquillette said that the proposed Federal Rule of Attorney Conduct 1, if promulgated, would supersede or eliminate all local rules on the subject of attorney conduct. But, he cautioned, the subject matter was very controversial, and the rules committees needed to proceed deliberately and slowly. He noted that opposition to the proposal could be encountered in the Judicial Conference, in Congress, by the Department of Justice, or among bar groups and state court organizations.

Professor Coquillette emphasized that the subcommittee was not asking the Standing Committee to approve Federal Rule of Attorney Conduct 1. Rather, it was simply seeking to inform the committee of the direction in which it was proceeding. The instant proposal, he said, consisted of a single, general rule and did not deal with specific categories of attorney conduct, such as contacts with represented parties. These, he said, could eventually be incorporated in a Federal Rule of Attorney Conduct 2. The proposal, moreover, did not address specific problems of attorney conduct in the bankruptcy courts, which might become the subject of a Federal Rule of Attorney Conduct 3.

Chief Justice Veasey said that the balkanization of federal local rules on attorney conduct needed to be addressed. He pointed out that he had left the subcommittee meeting before the vote was taken to approve Federal Rule of Attorney Conduct 1 and had articulated some concerns with the language of the draft. He said that he favored a single dynamic conformity rule, with no additional federal rules. Chief Justice Veasey also reported that the Conference of Chief Justices has appointed a committee to consider and comment on proposed Federal Rule of Attorney Conduct 1, as well as any other proposals that the Standing Committee might develop.

It was pointed out during the ensuing discussion that the American Bar Association was in the process of revisiting its Model Rules of Professional Conduct, including Rule 4.2, governing attorney contacts with represented parties. It was also noted that a proposal had been presented to the House of Delegates for a new, compromise version of Rule 4.2, but the Department of Justice did not agree to it. As a result, the proposal is apparently no longer alive, although the Ethics 2000 project would likely produce another version of Rule 4.2.

One of the members said that Rule 4.2 of the Model Rules of Professional Conduct raised important concerns for the Department of Justice and government attorneys that needed to be addressed. The central problem, he said, is that federal law enforcement authorities need to communicate directly with people who can supply important information to them as part of a criminal investigation or federal law enforcement action. But, he said, these contacts — which may be with witnesses,

employees, or targets of an investigation who are represented by counsel — occur before litigation is actually commenced in a federal court. Thus, they do not constitute procedural problems lying within the appropriate area of concern of the rules process, which begins with the commencement of litigation. He concluded that these issues should be addressed in another forum.

He added that the issue of government attorney contact with represented parties is extremely controversial, pitting law enforcement agencies against both civil liberties lawyers and corporate lawyers. Moreover, legislation is pending in Congress that would address the issue, and negotiations have been reopened among the Department of Justice and other interested groups.

He agreed with Chief Justice Veasey that the appropriate course of action for the rules committees was to approve a single national rule mandating dynamic conformity with state attorney conduct rules. He said that the proposed Federal Rule of Attorney Conduct 1(a)-(d) was well conceived. He was concerned, however, with proposed subdivision (e), which attempts to provide a safe harbor by allowing an attorney to assert that he or she took a particular action at the direction of a federal judge.

The problem for the Department of Justice and federal attorneys, he said, is that conduct rules vary from state to state. But, he argued, the risks that an attorney might face for following an order of a federal court are truly very small. In essence, they are not sufficient to warrant intruding on state authority.

Professor Cooper explained that proposed Federal Rule of Attorney Conduct 1 would leave enforcement of professional responsibility to the states, but it would also provide two narrow exceptions for federal court action. Subdivision (c) would give federal judges authority to regulate conduct in the cases before them. And subdivision (e) would provide a safe harbor for attorneys who take actions authorized by a federal court. Professor Cooper explained that several types of attorney conduct issues may arise in a federal case, involving such matters as maintaining the confidentiality of information and disqualifying opposing counsel for conflicts of interest. He pointed out, however, that the great bulk of disciplinary actions taken by the state bars involve such serious misconduct as convictions, rather than conflicts and procedural issues.

He said that the need for the safe harbor afforded by subdivision (e) may not be sufficient to outweigh the friction that it might engender with state authorities. One of the members added that state disciplinary bodies simply are too busy to address the kinds of matters contemplated by the exceptions, and they are not interested in pursuing federal prosecutors. Another added that it was just not good policy to authorize a federal judge to immunize a lawyer who has engaged in a violation of state ethical standards because state discipline could upset the federal case.



Mr. Marcus responded that the Department of Justice did not have a problem with the proposed Federal Rule of Attorney Conduct 1. It was hopeful of working out a solution to Rule 4.2 of the Model Rules, which might be incorporated into a Federal Rule of Attorney Conduct 2.

Judge Scirica added that members of the Judicial Conference have shown no indication that they want the judiciary to become involved in the dispute over Rule 4.2. First, he said, they do not see it on the merits as a procedural issue. Second, the House and Senate have very different views regarding the McDade amendment, and the judiciary should not get caught in the middle of a dispute that does not affect it directly. Judge Scirica pointed out, however, that legislation could be enacted at any time that would call on the rules committees and the Judicial Conference to take action or give advice to Congress.

One of the members pointed out that subdivision (c), which allows the federal courts to enforce all matters of procedure, will be difficult to apply in practice. He warned that there is an immense potential for attorneys to manipulate substance and procedure. The federal courts must be able to regulate the cases and proceedings before them. Therefore, the states, he said, should not be allowed to govern both substance and procedure.

Other members agreed strongly, and they pointed out that 28 U.S.C. § 1654 expressly authorizes federal courts to regulate who may practice before them. They said that there were a number of nuances that needed to be considered further in redrafting Federal Attorney Conduct Rule 1. First, there was the very difficult task of distinguishing between substance and procedure. Second, distinctions may be drawn between a federal court's statutory authority to admit attorneys to practice and its authority to discipline attorneys for specific conduct. Third, the rule provides that professional responsibility will be enforced by the proper state authority, but it also allows a federal court to enforce its procedural rules and orders by all appropriate sanctions.

Some members suggested that the intention of the rule was to have federal judges use state disciplinary processes normally, just as they do today. Federal courts, they said, should not regulate attorney conduct occurring outside the courtroom. But if an attorney's conduct is improper in a case before a federal judge, the judge will insist on disciplining the attorney in that case. Thus, even if a state allows a certain kind of conduct, a federal court should still be allowed to discipline an attorney for conduct occurring in the courtroom or the case. Some members pointed out that it would not be possible to draft a rule that would cover all situations. The problems of conduct and enforcement are simply too complicated to resolve with specificity in a federal rule.

## FINANCIAL DISCLOSURE

Judge Scirica reported that articles had appeared in the media criticizing some federal judges for not having disqualified themselves in cases when they had held a stock interest in one of the parties. He said that the reported slip-ups had been purely inadvertent on the part of the judges. Nonetheless, the articles had embarrassed the judges involved and to the federal judiciary as a whole.

Judge Scirica stated that Senator Patrick Leahy, ranking minority member of the Senate Judiciary Committee, had addressed the September 1999 meeting of the Judicial Conference. Senator Leahy told the Conference that the Congress was well aware of the adverse publicity flowing from the recent media exposés, and he urged the judiciary to take prompt action to address the problems and avoid potential Congressional intervention. Judge Scirica added that Senator Leahy is a man of great integrity and a good friend of the judiciary.

Judge Scirica noted that the judiciary was taking concerted action to reduce the likelihood of future recurrences. Among other things, he said, new computer software programs were being deployed in the courts to compare judges' financial holdings with the names of litigants in their courts' electronic docket systems. He noted, in particular, that Rule 26.1 of the Federal Rules of Appellate Procedure requires each non-governmental, corporate party in an appeal to file a statement with the court identifying all its corporate parents and listing any publicly held company that owns 10% or more of its stock.

### *Extending Federal Rule of Appellate Procedure 26.1*

Judge Scirica reported that the Judicial Conference's Committee on Codes of Conduct, chaired by District Judge Carol Bagley Amon (E.D.N.Y.), had suggested that the rules committees consider amending the civil, criminal, and bankruptcy rules to add requirements similar to FED. R. APP. P. 26.1. He pointed out that Professors Cooper and Coquillette had consulted with the chairs and reporters of the advisory committees and had prepared three alternate versions of a draft new Federal Rule of Civil Procedure 7.1. Copies of the three versions had been circulated to the members of the Standing Committee and to Judge Amon for preliminary review. The proposed new rule, based on FED. R. APP. P. 26.1, would require corporate litigants in civil cases to file a disclosure statement at the time of their first filing or appearance in a case. Its text would be adapted appropriately for use in criminal and bankruptcy cases.

Judge Scirica reported that the Federal Judicial Center, at his request, had conducted an analysis of both the content and the structure of all existing local rules and general orders of the district courts and bankruptcy courts that require parties to disclose corporate affiliations. He noted that this and other research had uncovered

wide variance among the trial courts — and among the courts of appeals — as to the type and amount of information that they require parties to disclose.

Judge Scirica noted, however, that Judge Duplantier had stated earlier in the meeting — correctly in his view — that financial disclosure and conflicts of interest were not, strictly speaking, rules matters. National disclosure rules, moreover, would not have averted any of the incidents described by the media.

Nevertheless, he said, a disclosure rule already exists in the Federal Rules of Appellate Procedure. Moreover, both the Codes of Conduct Committee and the Congress were expecting the rules committee to initiate action to address disclosure requirements in the civil, criminal, and bankruptcy rules.

Judge Scirica stated that the advisory committees could approve new rules at their next meetings, which could be considered by the Standing Committee in June 2000 and published for public comment by late summer. At the same time — using the administrative authority of the Director of the Administrative Office — action could proceed to develop a national disclosure form that corporate parties would have to file in district court and bankruptcy court cases. He emphasized that the form could be placed in the courts relatively quickly, well in advance of the time required to promulgate new rules under the Rules Enabling Act process.

#### *Financial Disclosure Form*

One of the members suggested that issuance of a Director's form would be sufficient in itself and argued against promulgating any new federal rules. He noted that parties in the district court are required presently to file a cover sheet in civil cases that, among other things, asks them to disclose any related cases in which they are a party. That reporting form, he said, could readily be expanded to include a requirement that they also identify any corporate ownership.

Professor Coquillette said that the Codes of Conduct Committee and the Congress would be pleased if the rules committees simply replicated FED. R. APP. P. 26.1 in the civil, criminal, and bankruptcy rules, even though it would take about three years for new rules to take effect under the Rules Enabling Act process. He recommended that the committee take two simultaneous actions: (1) proceed with the proposed rule amendments; and (2) ask the Judicial Conference to adopt a uniform national disclosure form immediately.

Professor Coquillette pointed out that there was great advantage to having a national form because it could be issued quickly. The Judicial Conference, moreover, would have flexibility to adapt and change the details of the reporting requirements from time to time without having to invoke the lengthy and formal rules amendment process.

He said that the Codes of Conduct Committee had the expertise and jurisdiction over the subject matter and should devise the form, assisted as needed by the Administrative Office, the Financial Disclosure Committee, and the rules committees.

Professor Coquillette reported that Professor Cooper had just prepared a revised draft of the proposed new Federal Rule of Civil Procedure 7.1 that would require a corporate party to an action or proceeding in the district court to file two copies of a form that : (1) identifies its parent corporations and companies owning 10% of more of its stock; and (2) provides any additional information required by the Judicial Conference. The form would be filed at a party's first appearance in a case and would have to be updated whenever conditions change.

Professor Coquillette explained that it would be practically impossible to design a form that would disclose all the sorts of information that might trigger the recusal of a judge. The information that FED. R. APP. P. 26.1 requires a party to disclose, he said, is minimal. In fact, he noted, the 1998 amendments to Rule 26.1 had reduced the amount of information that parties must disclose to the court. The earlier, 1989 version of the rule had required that corporate parties also disclose, not only parents, but also subsidiaries and affiliates.

Professor Coquillette explained that at the time the 1998 amendments were being considered, the chief judges of the respective courts of appeals had indicated that they wanted the parties to disclose additional information, but they could not agree on the details of what information should be required in the national rule . Thus, the Advisory Committee on Appellate Rules adopted minimal disclosure requirements in the 1998 amendments to FED. R. APP. P. 26.1, but it also explicitly encouraged the courts to issue local rules to supplement the nationally required disclosures. As a result, 11 of the 13 courts of appeals currently require some sort of additional disclosure in their local rules.

One of the participants emphasized the need to require the parties to update the information on their disclosure form. He explained that his own court's disclosure rule had been in effect for many years, but the lawyers pay little attention to it. He stressed that recusal is the personal responsibility of the judges themselves, rather than the lawyers. The judges, he said, need a national rule, coupled with effective publicity among the bar, to make it work.

Several members recommended that work begin immediately on a draft rule and form that could be submitted to the Standing Committee for action at its June 2000 meeting. They pointed out that the rules committees needed to work with the Codes of Conduct Committee and the Administrative Office to develop a clear plan of action for consideration at the next meeting of the Judicial Conference.

*Telephone Conference with Judge Amon*

Judge Amon, chair of the Codes of Conduct Committee, participated in the discussion by telephone. She referred to her letter to Judge Scirica of December 29, 1999, in which she commented on three alternate disclosure proposals that had been sent to her for preliminary consideration. The first would consist of a rule patterned narrowly after FED. R. APP. P. 26.1, with an additional requirement that parties file supplemental disclosures promptly upon any changes in circumstances. The second would require parties to file a disclosure form approved by the Judicial Conference. The third alternative would require parties to file a disclosure form devised by local rule of court.

Judge Amon pointed out that her committee had not yet met, and it had not yet considered the three alternatives. She said, however, that in her own personal view the first of the three alternatives — a rule patterned narrowly after FED. R. APP. P. 26.1 — would satisfy all the objectives of the Codes of Conduct Committee and would be fully sufficient to address the statutory disqualification of a judge.

Judge Scirica and Professor Coquillette informed Judge Amon that the reporters had just drafted a hybrid proposal that would essentially combine the first two alternatives. It would be based on FED. R. APP. P. 26.1, but it would also require the parties to disclose on a form any additional sorts of information required by the Judicial Conference. Professor Coquillette noted that the proposal had the advantage of allowing for immediate action, in that a national form could be brought into effect much faster than a rule change.

Judge Scirica informed Judge Amon that the Standing Committee believed that the Codes of Conduct Committee would be in the best position to determine the content of the disclosure form, but the rules committees would be pleased to assist in any drafting. Professor Coquillette added that the proposed national rules would refer explicitly to the disclosure form, but the form itself could be put into effect well before the rules. It could be made available to every clerk's office and distributed to the bar.

Judge Amon said that the revised proposal sounded feasible and reasonable, and she promised to place it formally before the Codes of Conduct Committee at its meeting the following week. Judge Scirica agreed to complete work on drafting the proposal and to send it to Judge Amon in a few days in time for the meeting of her committee.

#### *Bankruptcy Cases*

Professor Morris pointed out that there would be some complications in adapting the rule and form for use in bankruptcy cases. The proposed rule, he said, requires a "party" to disclose specified information to the court. But, he noted, many affected entities in a bankruptcy case may not even be parties. Thus, the Advisory Committee on Bankruptcy Rules will have to consider how to deal with non-parties.

One member added that the sheer number of parties involved in a bankruptcy case will make it very difficult to devise a simple rule to govern bankruptcy. He suggested that consideration be given to some sort of *de minimis* standard. Thus, a different requirement might apply when the number of parties in a case exceeds a certain number. Another member suggested that some obligation might be placed on creditors' committees to filter out conflicts of interest for the court.

#### *Preclusion of Local Rules*

Professor Cooper pointed out that one of the key decisions that the committee must make is whether to permit or prohibit the individual courts to supplement the information required on the national form. During the ensuing committee discussion, several members spoke out strongly for establishing a single, national standard, without the opportunity for local court variations. One member stressed that a single mistake by a judge in any district could tarnish the entire judiciary. He added that even though individual courts should not be permitted to change the national disclosure requirements, the attorneys themselves should be given latitude to submit additional information to the court that they believe might bear on recusal.

Judge Scirica said that there appeared to be a clear consensus on the committee for adopting uniform, national standards for disclosure that would preclude local rules. But, he said, several courts are likely to be comfortable with the expanded disclosure requirements set forth in their current local rules. If they are precluded from obtaining information that they believe is helpful to them for recusal purposes, they will likely oppose the rule. He suggested that it might be advisable to allow some variation among the courts, at least for a while.

Several members pointed out, though, that the local provisions generally add very little of value and that there was no compelling reason to allow local variation in the area of ethics. They added that a judge in an individual case still retains the authority to require additional disclosures. Members also noted that the rules simply cannot insulate judges completely from the requirement of 28 U.S.C. § 455(a) that a judge disqualify himself or herself in any proceeding in which his or her impartiality might be questioned.

**Judge Scirica asked for a show of hands in support of the direction in which the committee was heading, *i.e.*, (1) preparing a rule for adoption in the civil, criminal, and bankruptcy rules (with appropriate adjustments for bankruptcy) that would require the disclosures of FED. R. APP. P. 26.1; and (2) requiring a form that contains the Rule 26.1 information and any other disclosures required by the Judicial Conference. This approach was approved without opposition.**

Judge Scirica said that the final language of the rule and form and other details could be worked out by the chairs and reporters, Judge Amon, himself, and Administrative Office staff.

### LOCAL RULES PROJECT

Professor Squiers presented the report of the local rules project, as set forth in her memorandum of December 5, 1999. (Agenda Item 12)

She provided a brief history of the committees's study of local court rules, dating back to 1986, and gave an overview of the process she was following in conducting a new study of the local rules. She explained that the project will evaluate the existing local rules to determine whether they comply with the Rules Enabling Act, whether they highlight areas that may more appropriately be contained in the national rules, and whether they have successfully operated in particular fields that other courts might wish to emulate. She added that the project would also examine whether and how the judicial councils of the circuits were reviewing existing and proposed local district court rules under 28 U.S.C. § 2071(c). And, finally, the project would examine the impact of the Civil Justice Reform Act on local rule proliferation.

Professor Squiers reported that she was entering the local rules into a computer data base and would examine and categorize them by topic. She explained that it was still too early in the study to draw conclusions or even have significant insights. But she said that the uniform numbering requirement of the federal rules had made the review process a good deal easier. She also said that it appeared that the number of local rules had increased, particularly regarding discovery and the areas addressed by the Civil Justice Reform Act.

### REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Laffitte reported that the technology subcommittee had two items on its agenda — the electronic case filing project and electronic evidence.

He said that the subcommittee was monitoring the development of the electronic filing project in five district courts and five bankruptcy courts, with a view towards determining whether any changes might be needed in the federal rules to remove legal impediments to the electronic processing of cases. He noted that public comments were being received on the proposed amendments to authorize service by electronic means on consent of the parties.

Mr. Laffitte reported that the Court Administration and Case Management Committee had formed an ad hoc subcommittee on privacy and access to electronic files, and that he was the liaison from the rules committees to the new subcommittee. He noted that there was a natural tension between the tradition of open court records, on the one hand, and privacy concerns raised by posting on the Internet court files containing sensitive personal, medical, and financial information. He complimented the Office of Judges Programs of the Administrative Office for having prepared excellent documentation on the privacy issues.

Mr. Laffitte also reported that the Federal Judicial Center was in the process of conducting a research project to study evidence of an electronic nature in order to help judges deal with problems of evidence in electronic form. He also noted that the discovery subcommittee of the Advisory Committee on Civil Rules was exploring issues raised by the discovery of information in electronic form.

#### NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for June 7 and 8, 2000.

Respectfully submitted,

Peter G. McCabe,  
Secretary