COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 13-14, 2005
Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 13-14, 2005

1. Opening Remarks of the Chair

   A. Report on the September 2004 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to the Supreme Court
   C. Expedited consideration of proposed rules amendments authorizing a court to require electronic filing

2. **ACTION** – Approving Minutes of June 2004 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Appellate Rules Committee

6. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference a proposed technical amendment to Rule 7007.1 without publication
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1014 and 3007
   C. Minutes and other informational items

7. Report of the Civil Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed new Rule 5.1 and conforming amendments to Rule 24(c)
   B. **ACTION** – Approving publishing for public comment proposed restyled Rule 23 and Rules 64 to 86
   C. **ACTION** – Approving publication of noncontroversial style-substance amendments to Rules 64 to 86
   D. **ACTION** – Approving proposed amendments resolving "global issues"
   E. **ACTION** – Approving publication of restyled Rules 1- 86, as revised, for public comment beginning in February 2005 and ending December 31, 2005
   F. Minutes and other informational items

8. Report of the Criminal Rules Committee

9. Report of the Evidence Rules Committee

10. Request to Recommit Proposed Amendments to Criminal Rule 29 to Advisory Committee on Criminal Rules for Further Consideration

11. Report of the Technology Subcommittee

12. Long-Range Planning Report

13. Panel Discussion of Transnational Simplified Rules

14. Next Meeting: June 16-17, 2005, in Boston, Massachusetts

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December 13, 2004

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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David J. Beck	ESQ	Texas	2003	2006
David M. Bernick	ESQ	Illinois	1999	2005
James B. Comey, Jr.*	DOJ	Washington, DC	—	Open
Charles J. Cooper	ESQ	Washington, DC	1998	2005
Sidney A. Fitzwater	D	Texas (Northern)	2000	2006
Harris L. Hartz	C	Tenth Circuit	2003	2006
Mary Kay Kane	ACAD	California	2000	2006
John G. Kester	ESQ	Washington, DC	2004	2007
Mark R. Kravitz	D	Connecticut	2001	2007
J. Garvan Murtha	D	Vermont	1999	2005
Thomas W. Thrash, Jr.	D	Georgia (Northern)	2000	2006
Charles Talley Wells	JUST	Florida	2000	2006
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WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 27, 2004

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rule 28.1 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 27, 2004

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 of the Federal Rules of Bankruptcy Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

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OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 27, 2004

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 6, 27, and 45 of the Federal Rules of Civil Procedure, and Rules B and C of the Supplemental Rules for Certain Admiralty and Maritime Claims. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

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WASHINGTON, D.C. 20544

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Presiding

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October 27, 2004

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 12.2, 29, 32.1, 33, 34, 45, and new Rule 59 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham
Secretary

Attachments

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Sacramento, CA 95814-7300

Dear Judge Levi:

At our recent Summer meeting, and as part of the Executive Committee's budget initiative, our Committee considered a myriad of cost containment ideas, one of which was that all cases filed in federal court be done exclusively through the CM/ECF system. After discussing this proposal, it was the consensus of the Committee that significant savings can and will be achieved through electronic filing, and therefore mandatory electronic filing should be encouraged to the fullest extent possible. Because this proposal has obvious implications for the federal rules of procedure and therefore your Committee, I wanted to alert you to our Committee's recommendations.

As you are aware, our Committee – at the request of and in coordination with your Committee – has developed model local electronic filing rules (which were subsequently endorsed by the Judicial Conference) that strongly encourage electronic filing. One of the fundamental reasons for developing these model rules was to assist the Rules Committee in its consideration of the development of national rules for electronic filing. These rules have been provided to the courts for over two years, and have been of great assistance in implementing CM/ECF.

At our Summer meeting, the Committee considered a series of proposed amendments to those rules that would create a presumption that all documents would be electronically filed, unless otherwise ordered by the court upon a showing of good cause. The Committee decided, however, that these proposals would probably conflict with the current Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005, which state that a court may "permit" electronic filing, and therefore declined to endorse them. Instead, our Committee decided to tackle the issue head on, by

recommending that the Rules Committee consider expedited amendments to the civil and bankruptcy rules that would authorize the courts to "require" the use of electronic filing but that would also incorporate appropriate exceptions. Fundamentally, the Committee believes this to be the most appropriate way to formally implement electronic case filing into the culture of the federal courts. And, while the Committee was cognizant of the fact that the Appellate courts will not start implementing CM/ECF until January of 2005, and will not go live until January 2006 at the earliest, we believe now is an appropriate time to begin the rules process to effect these changes, in order that they be implemented as quickly as possible.

In the meantime, the Committee also plans to consider amendments – to the extent they are possible – to the current model local rules that would more strongly encourage the use of electronic filing without violating the current federal rules. The Committee is also requesting the Executive Committee, as part of its cost containment initiative, to strongly urge courts to work with their local bars to ensure that CM/ECF is implemented to the greatest extent possible. The Committee believes this will help eliminate paper filing practices, as well as dual paper and electronic filing practices, in favor of the full incorporation of electronic case filing, thereby achieving cost savings through this technology.

Therefore, based on the Committee's recommendations, I would like to formally request that the Rules Committee propose, on an expedited basis, amendments to Rule 5(e) of the Federal Rules of Procedure and Rule 5005(a)(2) of the Federal Rules of Bankruptcy Procedure that would authorize the courts to "require" the use of electronic filing, but would also incorporate appropriate exceptions. I would also welcome any suggestions your Committee may have regarding our initiative to review the current model local rules with an eye towards amending them to more strongly encourage electronic filing.

Thank you for your consideration of these proposals, and please do not hesitate to contact me if you would like to discuss them further. Our two committees have devoted an enormous amount of time and energy to these issues, and it looks like those efforts will continue for some time. I sincerely believe, however, that our efforts have been a great contribution to the federal judiciary.

Sincerely,

John W. Lungstrum

John W. Lungstrum

cc: Peter McCabe
John Rabiej

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 17-18, 2004
Washington, D.C.
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 17-18, 2004. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Professor Steven Gensler, Supreme Court Fellow with the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice was John S. Davis, Associate Deputy Attorney General.

INTRODUCTORY REMARKS

Judge Levi reported that no major amendments to the rules were scheduled to take effect on December 1, 2004. He noted that the Supreme Court had recommitted the proposed amendment to FED. R. EVID. 804(b)(3) — governing the hearsay exception for statements against penal interest — in light of its recent decision in *Crawford v. Washington.* In *Crawford,* the Court substantially revised its Confrontation Clause jurisprudence, thus making the proposed rule amendment inappropriate. He added that the Advisory Committee on Evidence Rules had decided to defer consideration of any

hearsay exception amendments until adequate case law develops to determine the meaning and implications of the *Crawford* case.

Judge Levi pointed out that the federal courts were facing a severe budget crisis that could result in substantial layoffs and furloughs of court staff. He explained that it was important for the committee to consider its rules decisions in the light of their impact on the resources of the courts. He noted that amendments have been proposed to the bankruptcy rules that could save the courts more than a million dollars in postage and handling costs by facilitating electronic notices and use of the national Bankruptcy Noticing Center. He explained that the committee would be asked to expedite the rulemaking process to achieve the anticipated savings earlier.

Judge Levi said that the project to restyle the civil rules was achieving excellent progress. The Style Subcommittee, he noted, had now reached the landmark of having completed a first draft of all 86 rules.

Judge Levi reported that the E-Government Subcommittee had met the day before the committee meeting to refine the guidance that it would provide the advisory committees in drafting rules amendments to implement the E-Government Act of 2002. The statute requires that rules be promulgated under the Rules Enabling Act to protect privacy and security concerns implicated by posting court case files on the Internet.

Judge Levi noted that the Court Administration and Case Management Committee had been working diligently on privacy and security issues for three years and had offered constructive comments on the latest proposed guidance to the advisory committee. He added that the E-Government Subcommittee had made a great deal of progress at its meeting in addressing a number of difficult policy and practical questions raised when court documents that had been practically obscure in the past are now posted on the Internet. He observed that there will likely have to be some differences in detail among the amendments proposed by the advisory committees. The bankruptcy rules, he noted, will be the most affected by privacy concerns because of the heavy use of social security numbers in bankruptcy cases.

Judge Levi reported that he attends most of the meetings of the advisory committees. Each committee, he observed, has a different personality, reflecting in part the style of its chair and reporter and the role of the Department of Justice. He emphasized that the rules process is blessed with great chairs and reporters, and the work product of the committees is truly outstanding.

Judge Levi noted that the Chief Justice had extended Judge Alito's term as chair of the Advisory Committee on Appellate Rules for an additional year. He also reported that Judge Susan Bucklew had been selected to replace Judge Carnes as chair of the Advisory Committee on Criminal Rules and Judge Thomas Zilly had been selected to replace Judge

Small as chair of the Advisory Committee on Bankruptcy Rules. He said that Judge Carnes and Judge Small had been outstanding and successful committee chairs, and they would be sorely missed. He also reported that the Standing Committee would greatly miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — Charles Cooper and Patrick McCartan. Finally, Judge Levi emphasized that one of the highlights of his legal career had been to work closely with Professor Cooper as reporter to the Advisory Committee on Civil Rules.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 15-16, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring 34 bills introduced in the 108th Congress that would affect the federal rules.

He noted that legislation was still pending, proposed by the bail bond industry, that would directly amend the Federal Rules of Criminal Procedure and limit the authority of a judge to forfeit a bond. He said that the bill had been reported out by the House Judiciary Committee, but was opposed by the Judicial Conference. The legislation, he said, had not reached the House floor, thanks to efforts by the Administrative Office and the Department of Justice. He added that: (1) there had been recent communications with representatives of the bail bond industry, but the industry had not changed its essential position; and (2) there has been no action on the bill in the Senate.

Mr. Rabiej noted that legislation sponsored jointly by the Judicial Conference and the Department of Justice should be be enacted shortly to amend the E-Government Act. Under the present law, a party has the right to file an unredacted version of a document under seal with the court. In accordance with the revised E-Government Act, the public file would contain only a redacted version of the document or a reference list identifying redacted information accessible only to the parties and the court. He added that the E-Government Subcommittee and the advisory committees are now implementing the rulemaking requirements of the Act.

Mr. Rabiej reported that the Class Action Fairness Act was expected to be brought to the Senate floor for debate sometime in June.

He noted that comprehensive crime victims' rights legislation had passed the Senate in April 2004 on a 96-1 vote. It would give criminal victims a broad array of rights in such areas as protection against the accused, notice of proceedings, being heard at court proceedings, conferring with prosecutors, and receiving restitution. He added that the legislation was expected to pass the House of Representatives, but the chair of the House Judiciary Committee appeared to be holding up the legislation for tactical reasons.

Mr. Rabiej said that the crime victims legislation will have an impact on the criminal rules. He explained that the Advisory Committee on Criminal Rules had a separate proposal ready for final approval that would amend FED. R. CRIM. P. 32 to extend the right of allocution to victims of all crimes, not just victims of violence or sexual abuse.

Mr. Rabiej reported that two more bills had been introduced in the preceeding week that appeared to be moving quickly through the legislative process. First, he said, a hearing would be held within a week on H.R. 4547, a bill designed to protect children from drug violence. He noted that it would directly amend FED. R. CRIM. P. 11 to impose additional conditions on a court before it may accept a plea agreement. The second new bill (H.R. 4571), designed to limit "frivolous filings," would directly amend FED. R. CIV. P. 11 by mandating that a judge impose sanctions for a violation of the rule.

REPORT OF THE FEDERAL JUDICIAL CENTER

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

He reported that the Center was completing work on developing a new weighted caseload formula for the district courts. He explained that the study had been completed without requiring judges to keep detailed diaries of their daily activities.

Mr. Cecil noted that the Center had also completed a report comparing class actions in the federal and state courts. Among other things, the report addresses why attorneys bring cases in one court system rather than the other and finds few differences between federal and state judges and cases. Finally, he pointed to a new Center report on sealed court settlements. One of the findings of the report is that only 1 of every 227 civil cases in the federal courts contains a sealed settlement.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 14, 2004. (Agenda Item 6)

Amendments for Final Approval

FED. R. APP. P. 4(a)(6)

Judge Alito said that the proposed amendments to Rule 4(a)(6) (reopening the time to file an appeal) provides an avenue of relief for parties who fail to file a timely appeal because they have not received notice of the entry of judgment against them. The amendment allows a court to reopen the time to appeal if certain conditions are met. First, the court must find that the party did not receive notice of the judgment within 21 days after entry. Second, the party must move to reopen the time to appeal within 7 days after receiving notice of the entry of judgment. And third, the party must move to reopen within 180 after entry of the judgment.

Judge Alito pointed out that use of the word "notice," appearing twice in the rule, has been unclear. Most courts have interpreted the existing rule as requiring that the type of notice required to trigger the 7-day period to reopen be written notice. Others, though, have included other types of communications. The proposed amendment, he said, offers a clear solution by specifying that notice must be the formal clerk's office notice required under FED. R. CIV. P. 77(d).

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

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito stated that the proposed amendments to Rule 26 (computing time) and 45 (when court is open) would replace the incorrect phrase "President' Day" with "Washington's Birthday," the official, statutory name of the holiday.

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

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

Judge Alito explained that Rule 32 (form of briefs) sets out typeface and type-style requirements. But Rule 27, which specifies the requirements for motions, does not. The proposed amendment would add a new Subdivision (E) to Rule 27(d)(1) to make it clear

that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motions papers.

Judge Alito said that the proposed amendment had received support during the public comment period, although one comment suggested increasing the number of words allowed in motions. He said that there was also some sentiment to express the length limits in terms of words, rather than pages. But, he explained, clerks of court favor a page limit because it is much easier to verify.

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

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito reported that the current rules say very little about briefing in cases involving cross-appeals. As a result, local rules fill in the gaps with procedural guidance. The advisory committee, he said, recommended moving the few provisions in the current national rules addressing cross-appeals into a new Rule 28.1 and adding several new provisions to fill the gaps in the existing rules. The new Rule 28.1 (cross-appeals) would parallel Rule 28 (briefs). In addition, conforming amendments would be made to Rule 28(c) (briefs), 32(a)(7)(C) (certificate of compliance), and 34(d) (oral argument).

The provisions of the new rule, he said, follow the local rules of every circuit save one. They would authorize four briefs and specify their lengths and colors. (1) The appellant's principal brief would be limited to 14,000 words. (2) The appellee's combined response brief and cross-appeal principal brief would be limited to 16,500 words. (3) The appellant's response and reply brief would be limited to 14,000 words. (4) Finally, the appellees's reply brief would be limited to 7,000 words.

Judge Alito said that the lawyers who had commented on the proposal uniformly had recommended higher word limits, while the judges who had commented wanted fewer words. Professor Schiltz added that the local rules of the circuits generally prescribe word limits of 14,000, 14,000, 14,000, and 7,000 for the four briefs. The advisory committee, he said, had decided to increase the second brief to 16,500 words because it serves two functions — responding to the appellant's principal brief and initiating the principal brief in the cross-appeal.

Several members said that the advisory committee's proposal to authorize an additional 2,500 words for the second brief was a sound compromise that should accommodate most cases and result in fewer motions by attorneys seeking word extensions.

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

FED. R. APP. P. 32.1

Judge Alito reported that the the proposed new Rule 32.1 (citing judicial dispositions) had attracted more than 500 public comments.

He noted that the proposed rule enjoyed the support of the major bar associations. It would equalize the treatment of unpublished opinions with other types of non-precedential materials presented to the courts of appeals. The rule, he emphasized, would merely prevent a court of appeals from prohibiting the citation of unpublished opinions. It would not require a court to give unpublished opinions any weight or precedential value, or even to pay any attention to them. It would just allow the parties to cite them. He said that prohibiting the citation of court opinions undermines confidence in the courts of appeals and the judiciary. It implies that there is something second-class about unpublished opinions. The practice, he said, is very difficult to explain to lay people and most practitioners.

On the other hand, he pointed out, opponents of the rule claim that it will have an adverse impact on judges because they will have to spend more of their limited time on crafting unpublished opinions. This, it is claimed, would both detract from the quality of judges' published opinions and lead to the issuance of more one-sentence orders. He noted, too, that opponents of the rule assert that it will inevitably require lawyers to take the time to read unpublished opinions and increase expenses for their clients.

Judge Alito emphasized that the advisory committee had taken the adverse comments very seriously, but it had concluded that there is simply no empirical support for them. He noted that a number of the federal circuits currently permit citation of unpublished opinions. The committee, he said, had not received any comments from judges on the courts allowing citation that the practice has increased their work. Moreover, he added, the trend at both the federal and state levels is moving away from non-citation rules.

Judge Alito said that, as a result of the public comments, the advisory committee had deleted from the proposed rule a clause that would have prohibited a court of appeals from prohibiting or restricting citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispostions."

Judge Levi observed that the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other. He congratulated Professor Schiltz for a superb job in summarizing the comments.

One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, would elevate unpublished opinions into actions of the court and give them a status that they do not presently have. He recommended that the proposal be deferred and the circuits be given time to issue their own rules addressing the contents and effect of unpublished opinions. He added that this approach would promote transparency, for the circuits would articulate what they are doing with regard to unpublished opinions.

One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court. He added that, regardless of precedential value, an unpublished opinion is in fact an official disposition by a government body.

Two members pointed out that the proposed rule had given rise to concern among state-court leadership as to the use by the federal courts of unpublished state-court opinions. For example, a federal court applying the doctrine in *Erie R.R. Co. v. Tompkins* might cite an unpublished state-court opinion as establishing binding state law in a way that the opinion was not intended to be used. Judge Alito responded that the advisory committee's deliberations had focused on citing a federal circuit court's own decisions, not on citing state-court opinions. Moreover, he said, the rule does not address what weight is to be given to unpublished opinions. He added, though, that he would not object to amending the rule to limit its application specifically to federal opinions.

One participant pointed out that unpublished opinions are widely available today, and the circuits are free to give them precedence or not, as they see fit. He argued that lawyers should be free to call a court's attention to cases decided by their colleagues that have similar facts and issues. Other panels of the court, he said, should be made aware of what one panel has done with a similar pattern of facts, particularly in sentencing guideline cases. He added that it would be beneficial for courts to look at their unpublished opinions as part of their efforts to achieve consistency and reliability in circuit case law.

One member observed that there are very strong arguments on both sides of the issue, but on balance he favored allowing the courts of appeals to continue their non-

citation policies. He said that the adverse consequences predicted by opponents of the rule might well come to pass. He emphasized the vital need for courts to have a two-tiered opinion system because some cases simply do not deserve the same time and attention as others. He also said that he was not convinced that it is appropriate to compare unpublished opinions of a court of appeals with other types of nonprecedential materials cited to the court. Unpublished opinions, he said, inevitably carry far more weight with the lawyers and the court because they have been signed off on by three judges of the deciding court.

One member noted that he had been struck by how strongly a number of judges feel about the issue. He said that the arguments on both sides appear to be empirical in nature, but they are essentially not provable at this point. He stressed the need for empirical research and suggested that the committee not be put in the position of accepting one side of the argument and rejecting the other without further data. He argued that appropriate research would focus on the practices and results in those circuits that allow citation of unpublished opinions. He conjectured that it should be possible to obtain good empirical data because several circuits now allow citation.

Judge Levi said that he agreed and had spoken with the Federal Judicial Center about what shape an empirical study might take. He emphasized that the proposed rule was very controversial. And in dealing with controversial matters, he said, the rules committees have consistently sought strong empirical support for proposed amendments. In this case, he noted, nine circuits now allow citation of unpublished opinions, and four do not. Researchers, for example, could examine the courts that allow citation to see whether disposition times have lengthened or the number of judgment orders has increased. In addition, judges and lawyers might be surveyed to examine the practical impact of citation policy on their work. Lawyers might be surveyed to examine whether citation policy affects the costs of legal practice. Attention might also be directed to the four circuits that prohibit citation to see whether there are any special conditions in those circuits that make them different.

Judge Levi added that it would be advisable to seek Judicial Conference approval of the proposed new rule at this time without supporting empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate. If the data turn out to support the proposed rule, he said, the committee would be in a much better position to secure Conference approval.

Several participants endorsed Judge Levi's approach, citing the great sensitivity of the issue among circuit judges, the need for a period of reflection, and the value of gathering whatever empirical data can be produced. One member added that there were powerful arguments in favor of the proposed amendment, but it would be a mistake institutionally to go forward with a rule that has generated so much opposition. He said

that, as a matter of basic policy, the committee should proceed with a controversial proposal only if: (1) there is a compelling need for the rule; and (2) the committee is convinced that the opposition is clearly wrong. Other participants endorsed this analysis, emphasizing the need for empirical information and institutional restraint. They added that a year's delay for study would not cause any harm and may even lead some opponents to reassess their positions.

Judge Alito agreed that a study would be helpful, especially since opposition to the rule was based largely on empirical observations. Mr. Cecil added that the Research Division of the Federal Judicial Center was prepared to conduct the research. He cautioned, however, that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.

Judge Kravitz moved to have the committee take no action on the proposed new Rule 32.1 and return it to the advisory committee, with the expectation that the advisory committee will work with the Federal Judicial Center to conduct appropriate empirical studies. The studies, for example, would explore the practical experience in the circuits that have adopted local rules allowing citation of unpublished opinions. The advisory committee would then have the discretion to make a fresh decision on the matter and return to the standing committee with a proposal, or not.

One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to instutional values and the rulemaking process. Judge Kravitz agreed to the clarification.

One member added that the advisory committee should take advantage of the delay to explore the impact of the rule on citing unpublished state-court opinions.

The committee without objection approved Judge Kravitz's motion by voice vote. Therefore, it decided to take no action on the proposed new Rule 32.1, return it to the advisory committee, and recommend that appropriate empirical study be undertaken.

FED. R. APP. P. 35(a)

Judge Alito reported that Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) both specify that "a majority of the circuit judges who are in regular active service" may order that an appeal or other proceeding be heard or reheard en banc. Although the standard applies to all the courts of appeals, he said, the circuits are divided in

interpreting the provision when one or more active judges are disqualified in a particular case. Seven circuits follow the "absolute majority" approach, counting disqualified judges in the base to calculate a majority. Six circuits follow the "case majority" approach, requiring a majority only of the active judges who are not recused.

Judge Alito emphasized that the advisory committee believes that whatever the rule means, it should mean the same all across the country. There is no principled basis, he said, for having different interpretations of the same rule. The primary objective of the proposed amendment, thus, was to promote national uniformity. The advisory committee, he said, believed that the better interpretation is the case majority approach because it is most consistent with what Congress must have intended in enacting the statute. He noted that 28 U.S.C. § 46(c) uses the phrase "circuit judges . . . in regular active service" twice. In the second sentence, the phrase clearly does not include disqualified judges, since disqualified judges obviously cannot participate in a case heard en banc. The proposed amendment to Rule 35(a), he added, was not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d).

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. BANKR. P. 1007

Judge Small reported that the proposed amendment to Rule 1007 (lists, schedules, and statements) would require a debtor to file a mailing matrix with the court, a practice now required universally by local court rules. The matrix must include the names and addresses of all entities listed on Schedules D-H, including holders of executory contracts and unexpired leases.

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

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that the proposed amendments to Rules 3004 (filing of claims by a debtor or trustee) and 3005 (filing of a claim, acceptance, or rejection by codebtor) deal with the situation where an entity other than the creditor files a proof of claim. The amendments to Rule 3004 make it clear that the third party may not file a proof of claim until the exclusive time has expired for the creditor to file its own proof of claim. In addition, FED. R. BANKR. P. 3005 would no longer permit the creditor to file a proof of claim to supersede the claim filed by the debtor or trustee. Instead, the creditor could amend the proof of claim filed by the debtor or trustee. The changes would make the rules consistent with § 501(c) of the Bankruptcy Code.

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

FED. R. BANKR. P. 4008

Judge Small reported that Rule 4008 (reaffirmation agreement) would be amended to establish a deadline of 30 days after entry of the order of discharge to file a reaffirmation agreement with the court. He said that some public comments had recommended a shorter period, and the advisory committee had considered a deadline of 10 days following discharge. But, he explained, the shorter time limit would not be practical because it takes several days for the the noticing center to process and distribute discharge notices.

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

FED. R. BANKR. P. 7004

Judge Small reported that the proposed amendment to Rule 7004 (process and service) would authorize the clerk of court to sign, seal, and issue a summons electronically. He noted that the rule does not address the service requirements for a summons, which are set out elsewhere in Rule 7004.

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

FED. R. BANKR. P. 9006

Judge Small stated that Rule 9006 (time) would be amended to remove any doubt that the additional three-day period given a responding party to act when service is made

on the party by specified means — by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served — are added after a rule's prescribed period to act expires.

The committee considered and approved the proposed amendment to Rule 9006 in conjunction with a proposed parallel amendment to FED. R. CIV. P. 6(e).

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

OFFICIAL FORMS 6-G, 16-D, and 17

Judge Small reported that the proposed amendments to the forms had not been published because they were technical in nature. The change to Form 6-G is required to conform the form to the proposed amendment to Rule 1007, and the revisions to Forms 16-D and 17 reflect the abrogation of Official Form 16-C in 2003. He asked that: (1) the changes to Form 16-D and 17 take effect on December 1, 2004; and (2) the change to Form 6-G take effect on December 1, 2005, to coincide with the effective date of the proposed amendments to Rule 1007.

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

Amendments for Publication

FED. R. BANKR. P. 1009, 4002, and OFFICIAL FORM 6-I

Judge Small pointed out that the proposed amendments to Rule 1009 (amendments to schedules and statements), Rule 4002 (debtor's duties), and Form 6-I (schedule of debtors' current income) had been proposed by the Executive Office for United States Trustees. He noted that the amendment to Rule 4002 was controversial.

The U.S. trustee organization had asked the committee for a rule that would require debtors to bring a substantial number of documents with them to the meeting of creditors under § 341 of the Code. The proposal, he said, had attracted the attention and strong opposition of the debtors' bar. The advisory committee had received more than 80 letters from attorneys opposing the proposal, even though the committee had not approved or published it.

Judge Small noted that the advisory committee's consumer subcommittee had met in Washington to consider the proposal, and it had invited several knowledgeable trustees and attorneys to participate, along with representatives of the U.S. trustee organization. At the meeting, the subcommittee decided that the most of the proposed changes were not needed.

The full committee, however, decided to adopt a compromise amendment to Rule 4002 that would require debtors to bring with them to the § 341 meeting a government-issued picture identification, evidence of their social security number, evidence of their current income (such as a pay stub), their most recent federal income tax return, and statements for each of their depository accounts. That, he said, was the proposal that the advisory committee sought authority to publish.

Judge Small said that the proposed amendment to Rule 1009 specifies that if the debtor files an incorrect social security number, he or she must correct it and notify all those who received notice of the incorrect number.

The proposed change to Form 6-I would extend to Chapter 7 cases the requirement that a debtor divulge a non-filing spouse's income. The form's mandate to divulge currently applies only to Chapter 12 and 13 cases.

The committee without objection approved the proposed rule amendments for publication by voice vote. It also approved without objection the proposed amendment to the Official Form by voice vote.

FED. R. BANKR. P. 7004

Judge Small explained that under the current Rule 7004 (process and service), the debtor's attorney must be served only if the summons and complaint are served on the debtor by mail. The proposed amendment would make it clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor, regardless of the manner of service on the debtor. The rule would also allow the attorney to request that service be made electronically.

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

FED. R. BANKR. P. 2002(g) and 9001

Judge Small reported that the changes to Rule 2002 (notices) and 9001 (general definitions) were designed in large part to facilitate noticing national creditors. The proposed amendment to Rule 2002(g) would allow creditors to make arrangements with a

"notice provider" to have notices sent to them at a preferred address or addresses. Notices would normally be sent electronically, but the rule also covers the sending of paper notices to central addresses. The amendment to Rule 9001 would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors at a preferred address or addresses under the proposed amendment to Rule 2002(g).

Judge Small explained that the amendments could result in significant financial benefits to the judiciary and taxpayers because more creditors would sign up for electronic service of court notices. In light of the potential cost savings, the advisory committee had decided to pursue "fast track" promulgation of these two amendments — as well as the amendment to Rule 9036 approved by the Standing Committee in January 2004, which specifies that notice by electronic means is complete on transmission.

Under the fast track proposal, the rules would become effective on December 1, 2005, rather than December 1, 2006. They would be published for public comment in August 2004. Comments would be due by mid-February 2005. The advisory committee and Standing Committee could approve them by mail ballot and submit them to the Judicial Conference for approval at its March 2005 session. They would then be sent immediately to the Supreme Court, which could act on them before May 1, 2005. Mr. Rabiej added that the Court would be given copies of the amendments well in advance of the March 2005 Conference session to give the justices time to review them carefully.

Judge Small said that the advisory committee had carefully considered the rules at three meetings, and he did not anticipate any controversy over them. Professor Morris added that even though the primary thrust of the rules was to facilitate electronic notice, there would also be savings in processing paper notices under the rules because notice providers will be able to bundle notices to creditors and save postage costs.

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

The committee also approved expediting approval of the amendments, together with the proposed amendment to Rule 9036 approved by the Standing Committee in January 2004.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of May 17, 2004. (Agenda Item 8)

Amendments for Final Approval

FED. R. CIV. P. 6(e)

Judge Rosenthal reported that the proposed change to Rule 6(e) (additional time allowed following certain kinds of service) had been referred by the Advisory Committee on Appellate Rules, which was considering parallel changes to FED. R. APP. P. 26(c). Under the existing Rule 6(e), there is some uncertainty in calculating the three additional days given a party to act when service is made on the party by mail, leaving it with the clerk of court, electronic means, or other means consented to by the party served.

The proposed clarifying amendment would specify that the three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and holidays would be included in counting the additional three days, but the last day cannot be a Saturday, Sunday, or holiday. Judge Rosenthal added that the committee note sets forth a number of practical examples calculating the time period.

One member asked why the advisory committee had not used the term "calendar days," as used in the appellate rules. Judge Rosenthal responded that the committee had considered that option, but had decided not to use "calendar days" because it is not found anywhere else in the civil rules.

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

FED. R. CIV. P. 27(a)(2)

Judge Rosenthal said that the proposed change in Rule 27 (deposition before action or pending appeal) would merely correct an outdated reference in the rule to former Rule 4(d), which deals with serving a copy of the petition and a notice stating the time and place of a deposition hearing. The corrected reference makes clear that all forms of service under Rule 4 can be used to serve a petition to perpetuate testimony.

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

FED. R. CIV. P. 45(a)

Judge Rosenthal reported that the proposed amendment to Rule 45 (subpoena) would close a small gap in the rule by requiring that a deposition subpoena state the method for recording testimony.

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

SUPPLEMENTAL RULE B(1)(a)

Judge Rosenthal stated that the proposed amendment to Supplemental Rule B (attachment and garnishment) would bring the rule into conformity with case law. The amendment specifies that the time for determining whether a defendant is "found" in a district is the time the verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed.

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

SUPPLEMENTAL RULE C(6)(b)

Judge Rosenthal reported that the proposed amendment to Supplemental Rule C(6) (responsive pleadings and interrogatories) would correct an oversight made during the course of the 2000 amendments to the rule. It would delete the rule's reference to a time 10 days after completed publication under Rule C(4). That rule requires publication of notice only if the property is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

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

Amendments for Publication

SUPPLEMENTAL RULE G

Professor Cooper explained that civil forfeiture proceedings have long been governed by the Supplementary Rules for Certain Admiralty and Maritime Claims because of tradition, the in rem nature of forfeiture proceedings, and many forfeiture statutes expressly invoking the supplemental rules. But, he said, the relationship had come under considerable strain because of an explosion in the number of civil forfeiture proceedings. In particular, court interpretations of the supplemental rules by the courts in forfeiture cases have been cited by the admiralty bar as creating problems for maritime practice.

Professor Cooper noted that the supplemental rules had been amended in 2000 to draw some distinctions between forfeiture and admiralty practice. At about the same time, Congress enacted the Civil Asset Forfeiture Reform Act, which required a number

of other changes in the rules as they apply to civil forfeiture proceedings. Soon after enactment of the legislation, the Department of Justice approached the Advisory Committee on Civil Rules, suggesting that it was time to consolidate all the civil forfeiture procedures into a single supplemental rule that would be consistent with the new statute.

Professor Cooper said that the advisory committee had appointed a subcommittee that produced a proposed new Rule G after several conference calls, a meeting in December 2003, and substantial input from the Department of Justice and the National Association of Criminal Defense Lawyers. The new rule, he said, was ready for publication, together with conforming amendments to SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E).

Professor Cooper pointed out that the advisory committee had devoted a great deal of attention to a proposal by the Department of Justice to define in the rule what "standing" is needed to assert a claim to property once the government initiates a civil forfeiture action. The Department had proposed that the rule limit standing to a person qualifying as an "owner" within the statutory definition of the innocent-owner defense. The committee, however, concluded that defining standing to file a claim should be left to developing case law, not the rules. Instead, proposed Rule G(8) only sets forth the procedural framework for determining a claimant's standing and deciding a claimant's motion to dismiss.

In the same vein, Professor Cooper reported that the advisory committee had not included a provision in the new rule barring the use FED. R. CRIM. P. 41(g) to accomplish the return of property outside Rule G. This issue, too, would be left to case law development.

Professor Cooper proceeded to describe the provisions of the new rule. He noted that subdivision (1) specifies that Rule G governs in rem forfeiture actions arising from federal statutes. It also states that Supplemental Rules C and E and the Federal Rules of Civil Procedure apply to the extent that Rule G does not address an issue.

Subdivision (2) would replace the particularized pleading in the existing rule with a statement of sufficiently detailed facts to support a reasonable belief that the government will be able to meets its burden of proof at a trial.

Subdivision (3), dealing with arrest warrants, would provide that only the court, on a finding of probable cause, may issue a warrant to arrest property not in the government's possession or not subject to a judicial restraining order. The existing rule allows issuance of a summons and warrant by the clerk without a probable-cause finding. In addition, the proposed rule would require the warrant and any supplemental service to

be served as soon as practicable, unless the court orders a different time. Professor Cooper noted that the National Association of Criminal Defense Lawyers had expressed concern that the change would encourage courts to permit more filings under seal. But, he added, the rule does not address when it is appropriate to file under seal. It merely reflects the consequences for execution when sealing or a stay is ordered.

Professor Cooper noted that subdivision (4), the basic notice requirement, reflects the traditional practice of publishing notice of an in rem action. For the first time, the rule would recognize publication on an official government-created Internet forfeiture site to provide a single, easily identified means of notice. He pointed out that there is no such site now, but if the government were to establish one, it would provide more effective notice than newspaper publication.

In addition, proposed paragraph (4)(b) would require the government to send individual notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant, based on the facts known to the government. Although the National Association of Defense Lawyers had asked for formal service of the summons in the manner required by FED. R. CIV. P. 4, the proposed rule does not require that level of service. Rather, due process requirements are satisfied by practical means reasonably calculated to accomplish actual notice.

The proposed rule also specifies that the notice must be sent by means reasonably calculated to reach the potential claimant. Notice may be sent to the attorney if the potential claimant has an attorney, and that this may be the most effective notice in many cases. Notice to an incarcerated person must be sent to the place of incarceration. The rule, however, does not attempt to deal with the due process problems implicated by *Dusenbery v. United States,* 534 U.S. 161 (2002), where a particular prison has deficient procedures for delivering notice to prisoners.

The proposed paragraph also sets out deadlines for filing claims and motions. Professor Cooper pointed out that the provision dealing with filing an answer or motion under FED. R. CIV. P. 12 had generated advisory committee discussion. Contrary to an ordinary civil action, where Rule 12 suspends the time to answer, the proposed rule requires that an answer or motion be filed no later than 20 days after a claim is filed.

Professor Cooper pointed out that under subdivision (5), a claim must identify the claimant and state the claimant's interest in the property. If the claim is filed by a person asserting an interest in the property as a bailee, it must identify the bailor.

Subdivision (6) would allow the government to serve special interrogatories under FED. R. CIV. P. 33 limited to the claimant's identity and relationship to the property. The purpose, he said, is to elicit information promptly so the government can move to dismiss

for lack of standing. The government need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered the interrogatories.

Professor Cooper noted that subdivision (7) would allow property to be sold on an interlocutory basis. The court could order the property sold, for example, if it were perishable or at risk of diminution of value. Likewise, it could be ordered sold if the expense of keeping the property is excessive, or if the court finds other good cause.

Professor Cooper pointed out that subdivision (8) govern motions. He noted that paragraph (8)(A) states that a party with standing to contest the lawfulness of the seizure of property may move to suppress use of the property as evidence. He explained that the advisory committee had deleted a reference in the proposed rule to constitutional standing under the Fourth Amendment. Likewise, a party who establishes standing to contest forfeiture may move to dismiss the action under FED. R. CIV. P. 12(b). At any time before trial, the government may also move to dismiss because the claimant lacks standing. Professor Cooper pointed out that the court must decide the government's motion before any motion by the claimant to dismiss the action. The claimant has the burden of establishing standing based on a preponderance of the evidence.

Professor Cooper stated that paragraph (8)(d) deals with a petition to release property under the Civil Asset Forfeiture Reform Act. The venue provision in the rule had been inserted at the request of the Department of Justice. It is derived from the statute and serves as a guide to practitioners. It makes clear that the status of a civil forfeiture action is a "civil action" eligible for transfer under 28 U.S.C. § 1404. Finally, Professor Cooper noted that the rule contains a provision allowing a claimant to seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

Judge Rosenthal reported that the Style Subcommittee had reviewed the proposed rule and had suggested a few improvements in language. She asked for and received permission to adopt the Style Subcommittee suggestions without having to return to the Standing Committee before publication.

Judge Rosenthal added that the advisory committee anticipated that a significant number of comments would be received during the publication period, but from a narrow section of the bar. Judge Levi and Professor Cooper pointed out that the committee had benefitted greatly as a result of excellent suggestions and input from the Department of Justice and the National Association of Criminal Defense Lawyers.

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

SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E)

Professor Cooper reported that the proposed changes to Supplemental Rules A, C, and E and FED. R. CIV. P. 26(a)(1)(E) were conforming amendments to account for the consolidation of civil forfeiture provisions into the new Rule G. He noted that the amendment to Rule 26(a)(1)(E) (initial disclosures) would add civil forfeiture actions to the list of cases exempted from the initial disclosure requirements.

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

FED. R. CIV. P. 50(b)

Judge Rosenthal reported that the proposed amendments to Rule 50(b) would remove a trap that occurs when a party moves for judgment as a matter of law under Rule 50(a) before the close of all the evidence and then fails to renew the motion at the close of all the evidence. The revised rule, she said, would delete the requirement that a renewal motion be made at the close of all the evidence. It responds to court decisions that have begun to move away from a strict interpretation of the current rule requiring a motion for judgment as a matter of law at the literal close of all the evidence. Professor Cooper added that the amendments are fully consistent with the Seventh Amendment.

In addition, the rule would be amended to add a time limit of 10 days after discharge of the jury for a party to make a post-trial motion when a trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict.

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

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

Judge Rosenthal reported that the package of "electronic discovery" amendments was the product of a lengthy and thorough examination by the advisory committee into whether the current rules are adequate to regulate discovery of electronically stored information. She pointed out that the committee had enjoyed invaluable cooperation and input from the bar on the project, and it had conducted three productive conferences with lawyers, judges, and law professors on electronic discovery. She thanked Professor Capra and Fordham Law School for hosting the most recent conference, held in New York in February 2004. She also thanked Kenneth Withers of the Federal Judicial Center for his major assistance and wise counsel.

Judge Rosenthal explained that the advisory committee had initiated the electronic discovery project with a good deal of skepticism regarding the need for rule changes. But as the project progressed and lawyers articulated their experiences, she said, the committee moved to a consensus that the existing discovery rules do not fit current practice as well as they should. The committee, she emphasized, had reached the conclusion that the national rules needed to be amended and the amendments were needed now.

Judge Rosenthal pointed out that the materials in the committee's agenda book demonstrate that there are many real differences between electronic discovery and other types of discovery. For one thing, computer-stored information is dynamic and often changes without active human intervention. Unlike paper information, moreover, computer information may be incomprehensible without the machine and software that created it.

She said that the bar had informed the committee that discovery had become more difficult, burdensome, and costly because the current rules — even though they are very flexible — are simply not specific enough with regard to electronic discovery. She pointed out that some federal district courts now have local rules in place governing electronic discovery, and pertinent case law is beginning to develop. In addition, state court systems have issued or are considering rules to deal with electronic discovery. She concluded that if the advisory committee were to wait too long to propose amendments to the national rules, it would run the risk of having local rules proliferate and wide variations develop in federal practice.

Judge Rosenthal summarized the advisory committee's key proposals, pointing out that they would: (1) require parties and the court early in a case to discuss issues relating to electronicaly stored information and privilege waiver; (2) clarify and modernize the definition of discoverable electronic information; (3) address the form in which electronically stored information must be produced; and (4) provide a procedure for handling inadvertent privilege waivers.

She explained that the committee had heard repeatedly from lawyers that privilege review of discovery materials is very time consuming and expensive. Electronically stored information, moreover, presents special problems because privileged information, though not readily visible, may be embedded in electronic documents or found in metadata. She emphasized that the proposed amendments respect the Rules Enabling Act and avoid dealing with the substance of privilege law. Rather, they only set forth a procedure for retrieving inadvertently produced privileged information.

FED. R. CIV. P. 26(f) and FORM 35

Professor Cooper said that the proposed amendments to FED. R. CIV. P. 26(f) (conference of the parties) were non-controversial. They would require the parties at the 26(f) conference to discuss any issues relating to preserving discoverable information and to include in their discovery plan: (1) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (2) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information. He noted that the latter item was a response to concerns expressed to the committee by members of the bar regarding the enormous burden imposed by having to screen voluminous documents for privilege.

He said that it was generally accepted that the discovery process moves much more quickly and efficiently when the parties in a case agree on how to deal with privilege issues. He said that the proposed amendment contemplates that the parties will enter an agreement. The court order will enhance the status of the agreement and may well affect future waiver litigation. In addition, Form 35 would be amended to include a new section dealing with disclosure of electronic information and privilege protection.

FED. R. CIV. P. 16(b)

Professor Cooper reported that the proposed amendments to FED. R. CIV. P. 16(b) (scheduling and planning) would alert the court to the need, early in the litigation, to address the handling of discovery of electronically stored information and to consider adopting the parties' agreement for protection against privilege waiver.

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

Professor Cooper explained that the proposed amendment to FED. R. CIV. P. 26(b)(5) (claims of privilege or protection of trial preparation materials) specifies that when a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party receiving the information that it claims a privilege. The receiving party must then promptly return or destroy the specified information and any copies. Professor Cooper added that the committee note specifies that the amendment does not address the controversial question of whether there has in fact been a privilege waiver. It merely provides a procedure for addressing privilege issues.

One member said that the proposed waiver provision would not make a real difference in practice. Parties, he said, will still have to review all documents in order to avoid the danger that a state court may find a waiver of privilege. He urged the

committee to publish a much more ambitious proposal that would address the waiver issue itself. He suggested that this would be a great opportunity for the committee to make a major improvement in practice.

Judge Rosenthal responded that the advisory committee was very sympathetic to that approach, but it had opted for a more cautious amendment because of concerns over the limits of the Rules Enabling Act. The statute specifies that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." (28 U.S.C. § 2074) Another participant added that privilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.

Other participants countered, though, that a bolder waiver proposal to protect parties against inadvertent waiver of privilege would in fact be consistent with the Rules Enabling Act. They asserted that a federal rules provision could specify that an inadvertent turnover of privileged material through the federal discovery process does not constitute a waiver of privilege. The provision, they said, would be procedural in nature, not substantive. It would not address the scope of the privilege itself. Instead, it would merely address the procedural consequences arising as a result of the mandatory federal discovery process. In other words, if a court requires a party to produce materials through the federal discovery rules, those rules can prescribe the character of the privilege waiver without modifying the content of the privilege itself.

One member pointed out that the advisory committee's proposed amendment may put a court in an awkward position because its order may not effectively bind third parties or prevail in a later proceeding before another court. He noted that there is a split in state law as to whether third parties are bound.

One member pointed out, though, that the proposed amendment would still be a valuable change because — despite uncertainty as to the scope of the privilege protection — parties are in a much better position with a court order than without one. Judge Rosenthal added that the pertinent committee note addresses the issue in general terms by stating that a court order adopting the parties' agreement "advances enforcement of the agreement betweeen the parties and adds protection againt nonparty assertions that privilege has been waived."

Another member noted that the proposed new Rule 26(b)(5)(B) states that a party receiving privileged information must promptly return or destroy it upon being notified by the producing party that it intends to assert a claim of privilege. He suggested that the rule might be amended to require the receiving party to certify that they have in fact destroyed the information in question.

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

Judge Rosenthal reported that the proposed new Rule 26(b)(2)(C) (discovery scope and limits) would establish a two-tiered approach to electronic discovery. A producing party would automatically have to turn over requested information that is "reasonably accessible." Even if it makes a showing that the information sought is not "reasonably accessible," the requesting party may then ask the court to order discovery of the information "for good cause." She pointed out that this approach is similar to the two-tiered approach embodied in the 2000 amendments to Rule 26(b)(1), under which parties may obtain discovery automatically as to matters "relevant to the claim or defense of any party," but they may ask the court for good cause to order discovery of any matter "relevant to the subject matter involved in the action."

One member pointed out that there is no provision in the proposed amendments explicitly addressing the sharing of discovery costs. He noted that judges already have general authority under Rule 26 to shift discovery costs, but recommended that the proposed amendments themselves, or the accompanying committee notes, specify that a judge may assess part or all of the costs of certain discovery requests on the requesting party. One member suggested that language covering cost sharing be added to the proposed amendment to Rule 26(b)(2)(C). Judge Rosenthal responded that it might be preferable to include such language in the committee note, rather than the rule.

Professor Cooper pointed out that the committee note in fact quotes the *Manual for Complex Litigation*, instructing that certain forms of production be conditioned upon a showing of need or the sharing of expenses. He pointed out, however, that the Standing Committee has been very sensitive to cost sharing or cost bearing, and it is a controversial concept for many members of the bar. Mr. Rabiej added that language regarding cost-shifting had been proposed by the Advisory Committee on Civil Rules in the 2000 amendments to Rule 26, but it had been removed by the Standing Committee.

Judge Kravitz moved to add language at the end of the proposed amendment to Rule 26(b)(2)(C) to specify that if a responding party shows that requested information is not reasonably accessible, the court may order discovery of the information "on such terms as the court may determine." He added that no explicit language as to cost sharing should be included in the text of the rule itself, but a reference to costs could be included in the committee note.

The committee without objection approved Judge Kravitz's motion by voice vote.

FED. R. CIV. P. 33

Judge Rosenthal noted that the proposed amendment to Rule 33(d) (option to produce business records in response to interrogatories) makes it clear that a party may respond to interrogatories by using electronically stored information.

FED. R. CIV. P. 34

Judge Rosenthal explained that the proposed amendments to Rule 34(a) (production of documents and inspection of tangible things) draw a new distinction between "electronically stored information" and "documents." The word "document" in the current rule, she said, is simply not adequate to capture all the types of information stored on computers. The proposed rule, thus, would acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. She also pointed out that under the amendment copying, testing, and sampling would apply explicitly both to electronically stored information and tangible things.

She noted that the proposed amendments to Rule 34(b) permit a party to specify the form in which it wants electronically stored information to be produced. If no request is made as to form, or if there is no agreement by the parties, the producing party may turn over the information in the form in which it is ordinarily maintained or in an electronically searchable form. One member suggested that the term "electronically accessible" might be more appropriate than "electronically searchable."

FED. R. CIV. P. 45

Judge Rosenthal reported that Rule 45 (subpoenas) would be amended to conform it to the various changes proposed in the discovery rules to address electronically stored information.

The committee without objection approved the proposed amendments to Rules 16, 26, 33, 34, and 45 and Form 35 for publication by voice vote.

FED. R. CIV. P. 37

Judge Rosenthal reported that the committee had approved a limited "safe harbor" provision in Rule 37 (sanctions for failure to cooperate in discovery) that would give a party protection when information that it is asked to produce has been destroyed or lost through the routine business operation of its computer systems. The loss would occur, for example, when information is destroyed as a result of recycling back-up tapes or automatically overwriting deleted information. She reported that this was the only provision among the proposed amendments in which there had been any disagreement

within the advisory committee. She pointed out, though, that the disagreement had been only as to the actual language of the proposed amendment, and not as to the need for including a limited safe harbor provision in the rules.

As a consequence, she explained, the advisory committee had decided to present the Standing Committee with two alternative versions of a safe harbor provision in FED. R. CIV. P. 37(f). She added that the committee clearly preferred Alternative 1, but several members also wanted to publish Alternative 2 for public comment. Both alternatives, she said, are very narrow. The essential difference between them concerns the standard of culpability applicable to the producing party. Alternative 1 would establish a reasonableness standard, while Alternative 2 would require intentional or reckless conduct. She reported that one member of the advisory committee strongly opposed publishing the second alternative because it would inappropriately limit a court's discretion.

Judge Rosenthal said that whether or not both alternate versions are published, it should be made clear in the publication that the committee is continuing to consider both culpability standards and would like to generate public comment specifically directed to them.

One participant emphasized that Rule 37 deals with sanctions for violation of discovery obligations. But, he said, spoliation issues are generally governed by a separate body of law. He pointed out that what occurs before a case is filed in the district court is not, and cannot be, covered by the rules. Thus, he said, the rules committees should focus on a party's obligation under applicable discovery law, not on spoliation. He suggested that the committee note state explicitly that spoliation is governed by a different body of law, even though discovery and spoliation issues often tend to blend in practice.

He added that the culpability standard under discovery law is negligence, including intentional neglect. But, he said, the key problem is not so much the applicable standard as the boundary of obligations arising before a case is filed and discovery obligations that attach after a case has been filed. Other members pointed out that lawyers' legal and ethical obligations before filing are clearly established by existing law.

One member said that even though the bar had made a compelling case for a safe harbor at the recent Fordham conference, it appeared that any effective protective provision would lie outside the scope of the rules. He suggested that it would take legislation to achieve the sort of protection that the bar seeks. Other members responded, though, that an effective safe harbor provision could indeed be crafted with some additional work.

In light of the difficult competing considerations and the committee discussions, Judge Rosenthal agreed to craft some additional language to address the concerns expressed by the participants. She emphasized the need to include a safe harbor provision together with the rest of the proposed electronic discovery amendments because all the amendments fit together as part of a single, interrelated package.

On the second day of the meeting, Judge Rosenthal presented the committee with revised language for both the text of the proposed Rule 37 amendments and the accompanying committee note. She noted that the proposed revisions would make it clear that the rule does not address the actions of a party before a case is filed.

Judge Rosenthal said that the recommendation of the advisory committee was to publish only one alternative for public comment. But, she said, that version would include appropriate brackets and footnotes to draw the attention of the public to the fact that the committee would continue to study what standard of fault must be met to take a party out of the safe harbor protection.

Dean Kane moved to approve publication of the proposed amendment, together with appropriate cover language —— to be drafted by the advisory committee — directing the public's attention to the committee's desire to receive public comment on the applicable culpability standard and the other issues identified by the committee. The motion was approved without objection by voice vote.

Amendments for Delayed Publication

1. Pure Style Revisions

FED. R. CIV. P. 38-63, except FED. R. CIV. P. 45

Judge Rosenthal reported that the advisory committee was planning to publish the complete set of restyled civil rules as a single package in February 2005. She noted that the Standing Committee at earlier meetings had approved publication of restyled Rules 1-37. She asked for authority to publish the current batch of proposed amendments — Rules 38-63, except Rule 45 — subject to further refinement before publication. And she reported that the remaining civil rules, Rules 64-86, would be presented to the Standing Committee at its January 2005 meeting.

Judge Rosenthal said that the advisory committee, in partnership with the Style Subcommittee of the Standing Committee and its consultants, would continue to make refinements in the language of the rules. It would also resolve a series of "global" style

issues and present a completed style package of all the civil rules at the January 2005 meeting.

The committee without objection authorized delayed publication of the proposed amendments by voice vote.

2. "Style-Substance" Amendments

FED. R. CIV. P. 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40

Judge Rosenthal reported that the goal of the restyling project was very narrow — simply to restate the present language of the civil rules as clearly as possible in consistent English without any change in meaning. Nevertheless, she said, as part of the restyling effort, the advisory committee had approved a limited number of minor, non-controversial improvements in language that are arguably more than purely stylistic in nature. She pointed out that the proposed changes, although possibly substantive, reflect sound common sense, universal current practice, or the likely intention of the drafters. Accordingly, she said, the advisory committee would like authority to publish in tandem with the style package a separate track of proposed "style-substance" changes to Rules 4(k), 8(a) & (d), 9(h), 11(a), 14(b), 16(c)(1), 26(g), 30(b), 31(c), 36(b), and 40. She added that a few additional minor "style-substance" changes might be presented to the Standing Committee at the January 2005 meeting.

One member spoke against the proposed deletion of Rule 8(d)(1) as part of the "style-substance" package. Although the proposed committee note suggested that the current rule is redundant and no longer needed, the member said that it might be helpful to retain it. Judge Rosenthal responded that it was important to restrict the "style-substance" package to purely non-controversial items. Thus, in light of the objection expressed, the advisory committee would drop the proposal from the list of proposed amendments.

The committee without objection approved the proposed "style-substance" amendments for deferred publication by voice vote.

Informational Item

Judge Rosenthal reported that the advisory committee had published a proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) to implement 28 U.S.C. § 2403 and replace the final three sentences of FED. R. CIV. P. 24(c). The statute and current rule require a court to certify to the attorney general of the United States or a state when a federal or state statute has been drawn into question. In addition, the rule requires

a party challenging the constitutionality of a statute to call the court's attention to its duty to certify.

Judge Rosenthal pointed out that the reporting obligation is routinely — and unintentionally — violated, perhaps because it is buried in Rule 24. Thus, the advisory committee had proposed moving the reporting requirements from Rule 24 to the proposed new Rule 5.1 in order to attract attention to the reporting obligations by locating them next to the rules that require notice by service and pleading.

In addition, the new rule would have added a requirement that a party drawing into question the constitutionality of a statute serve the pertinent attorney general by mail with a Notice of Constitutional Question and a copy of the underlying court pleading or motion. The advisory committee had thought that the additional requirement would impose only a slight burden on the challenging party.

Judge Rosenthal pointed out that there had been few public comments on the rule. But, she said, concerns emerged in the advisory committee that the new notice and mailing obligation was unwise and should be reexamined. Accordingly, the committee decided to defer the proposed new rule and not present it at this time to the Standing Committee for final approval.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachment of May 18, 2004. (Agenda Item 9)

Amendments for Final Approval

FED. R. CRIM. P. 12.2(d)

Judge Carnes reported that the proposed amendment to Rule 12.2(d) (failure to comply with the requirement to give notice of an insanity defense or submit to a mental examination) would fill a gap created in the 2002 amendments to the rule. The current rule provides no sanction when the defendant does not comply with the requirement to disclose the results and reports of an expert examination. He pointed out that a comment had been received from the defense bar that the proposed amendment goes too far. But, he noted that the decision to impose a sanction is discretionary with the court.

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

FED. R. CRIM. P. 29(c), 33(b), 34(b), and 45(b)

Judge Carnes explained that the proposed amendments to Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), Rule 34 (motion to arrest judgment), and Rule 45 (computing time) would remove the requirement that the court rule on a post-trial motion within seven days after a guilty verdict or after the court discharges the jury.

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

FED. R. CRIM. P. 32(i)(4)

Judge Carnes said that the proposed amendment to Rule 32(i)(4) (opportunity to speak at sentencing) would extend the right of allocution — which currently applies only to victims of crimes of violence or sexual abuse — to victims in all felony cases. The rule, he said, allows the victim either to speak at sentencing or submit a written statement to the judge. If a crime involves multiple victims, the rule gives the court discretion to limit the number of victims who will address the court.

Judge Carnes added that Congress was likely to pass comprehensive legislation in the near future dealing with victims' rights. He said that the legislation, among other things, would give a wide array of rights to victims of all offenses, including victims of petty offenses and other misdemeanors. He stated that if the pending legislation were enacted, the committee should ask to withdraw the rule.

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

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes reported that the proposed amendments to Rule 32.1 (revoking or modifying probation or supervised relief) would address an oversight in the rules by giving the defendant the right to allocution at a revocation or modification hearing.

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

FED. R. CRIM. P. 59

Judge Carnes reported that the proposed new Rule 59 (matters before a magistrate judge) would set forth the procedures for a district judge to review the decision of a

magistrate judge. He explained that the rule is derived in part from FED. R. CIV. P. 72. It distinguishes between "dispositive" and "nondispositive" matters, but does not attempt to define the terms, which are widely used in case law.

Judge Carnes pointed out that on a nondispositive matter, the district judge must consider any timely objections to the magistrate judge's order and set aside any part of the order that is contrary to law or clearly erroneous. But if a party fails to object within 10 days after being served with a copy of the magistrate judge's order, it waives its right to review.

As for dispositive matters, the district judge must decide de novo any recommendation of the magistrate judge to which an objection has been filed. A party's failure to object within 10 days after being served with a copy of the magistrate judge's recommended disposition waives its right to review. There is no need for the district judge to review de novo any matter to which there has not been a timely objection. Nevertheless, despite the waiver provision, the district judge retains authority to review any decision or recommendation of the magistrate judge, whether or not objections are timely filed.

One member said that he supported the rule, but he had a general problem with the way time is computed under this and some other rules. The proposed rule, he pointed out, states that a party must file an objection "within 10 days after being served with a copy" of the magistrate judge's order or recommendation. He pointed out that judges have no way of telling when a party has actually been served with a copy of a particular document. He suggested that consideration be given at a future committee meeting to addressing this uncertainty in computing time.

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

Amendments for Publication

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

Judge Carnes reported that two amendments were proposed to Rule 5(c)(3) (initial appearance in a district other than the one where the offense was committed). First, the amendment to Rule 5(c)(3)(C) would remove a reference to Rule 58(b)(2)(G). That rule, in turn, would be amended to eliminate a conflict with Rule 5.1(a) regarding the defendant's right to a preliminary examination. Second, the amendment to Rule 5(c)(3)(D) would take account of advances in technolgy and permit a magistrate judge to accept a warrant by any "reliable electronic means," rather than just by "facsimile."

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

FED. R. CRIM. P. 32.1(a)(5)

Judge Carnes explained that the proposed change to Rule 32.1 (revoking or modifying probation or supervised release) was similar to that proposed for Rule 5(c). It would authorize a magistrate judge to accept a copy of a judgment, warrant, or warrant application by "reliable electronic means."

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

FED. R. CRIM. P. 40(a) and (e)

Judge Carnes said that the proposed revision of Rule 40(a) (arrest for failing to appear in another district) would fill a gap in the rules by giving a magistrate judge explicit authority to set conditions of release for a defendant who has been arrested only for violation of conditions of release set in another district. He pointed out that the current rule refers only to a defendant who has been arrested for failure to appear altogether, and not to one who has only violated conditions of release.

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

FED. R. CRIM. P. 41

Judge Carnes reported that the proposed amendment to Rule 41(e) (issuing a search warrant) would permit a magistrate judge to use "reliable electronic means" to issue warrants. In that respect, it parallels the proposed amendments to Rules 5 and 32.1.

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

FED. R. CRIM. P. 58(b)

Judge Carnes explained that the proposed amendment to Rule 58(b)(2)(G) (initial appearance in a petty offense or other misdemeanor case) would remove a conflict between that rule and Rule 5.1 (preliminary examination) and clarify the advice that must be given to a defendant during an initial appearance.

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

Informational Items

FED. R. CRIM. P. 29

Associate Attorney General McCallum expressed the concerns of the Department of Justice regarding the May 2004 decision of the Advisory Committee on Criminal Rules to reject the Department's proposed amendments to Rule 29 (motion for a judgment of acquittal). The proposal would have required a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. The current rule gives a judge discretion to rule on an acquittal motion either before or after verdict.

Mr. McCallum pointed out that a district judge's granting of an acquittal motion before a jury verdict is a non-appealable action due to the Double Jeopardy clause of the U. S. Constitution. It is the only area, he said, in which the government has no right to correct an improper action of a trial judge. An appeal does lie, however, when a judge grants a motion for acquittal after a jury verdict.

He emphasized that United States attorneys are deeply troubled by the current rule and certain specific experiences that they have had under it. He noted that the original proposal of the Department had been to amend the rule to require a district judge to defer a ruling on an acquittal motion until after the jury returns a verdict. The aim, he said, was not to limit judicial discretion, but to address the timing of the judge's action, which has important constitutional consequences.

He explained that members had expressed concerns at the October 2003 advisory committee meeting that the Department's proposal might be too broad. They suggested that it is entirely appropriate for a judge to grant a dismissal before judgment in certain circumstances — particularly in the case of a hung jury or a multiple-defendant or multiple-count case. The advisory committee, he said, had asked the Department to consider crafting modifications to its proposal to address these two situations.

Mr. McCallum reported that the Criminal Division had prepared an amendment to deal with hung juries, but it was unable to devise a satisfactory amendment to address the problems of multiple defendants and multiple counts. But, he said, Judge Levi developed a very helpful, alternate proposal that would allow a judge to grant a dismissal before verdict conditioned upon the defendant waiving double-jeopardy rights and permitting an appeal by the government.

He said that because of the importance of this matter, the Department would like to present additional written materials and make a case for amending Rule 29 to the Standing Committee at its next meeting. If the Standing Committee were then to agree with the Department's recommendation — or with Judge Levi's alternate proposal or some other variation — it might propose an amendment itself. But, he noted, a more likely result would be for the Standing Committee to remand the matter back to the advisory committee with a direction to explore every possible alternative to achieve the result of preserving the government's right to appeal. He added that the Department would provide a comprehensive constitutional-law analysis of the Double Jeopardy clause and craft appropriate devices to avoid procedural traps. In short, he emphasized, the Department would like to work cooperatively with the Standing Committee to figure out a way to meet the government's concerns.

Judge Carnes reported that Administrative Office staff had prepared statistics on how often pre-verdict dismissals are granted in the federal courts. In the Fiscal Year 2002, for example, more than 80,000 felony defendants were disposed of in the district courts. Of that total, 3,000 were tried before a jury, and Rule 29 motions were granted in only 37 cases. He warned that the numbers may not be exact because of reporting difficulties in trying to pinpoint pre-verdict acquittals. Neverthless, he said, the number of dismissals under Rule 29 is extremely small. This, he explained, was a primary reason why the majority of the advisory committee were persuaded that there was no compelling case to amend the rule. He pointed out, though, that several members of the advisory committee were very much concerned that when a judge grants a pre-verdict dismissal mistakenly or in questionable circumstances, it reflects badly on the judicial system. In that regard, he noted that the Department had presented the committee with some anecdotes of district judges arguably abusing the process.

Judge Carnes further explained that several members of the advisory committee were concerned that certain prosecutors overcharge. Thus, judges should be able to winnow out groundless charges before a case is submitted to the jury. For that reason, he said, the advisory committee had asked the Department to consider amending its proposal to retain the authority of a trial judge to dismiss specific counts in a multiple-count case or certain defendants in a multi-defendant case. But, he explained, neither the Department nor the advisory committee could fashion a satisfactory proposal addressing those situations.

Judge Carnes said that the issues had been thoroughly explored by the advisory committee, including Judge Levi's alternate solution. If the matter were referred back to the advisory committee, he said, the same result would prevail again. Judge Levi agreed with this assessment, but he added that the Department should have a further opportunity to make a case. He pointed out that the Department has a vital role in the Rules Enabling Act process, and it has been supportive of the process. Therefore, he said, if the

Department concludes that a matter is very important to the government and it asks the Standing Committee to take a second look, the committee should accommodate the request.

Judge Levi pointed out that it is very common in rulemaking for empirical data to show that a particular problem is statistically insignificant. But the rejoinder by proponents of an amendment is always that the small number of problem occurrences in fact represents important matters. He recommended that the committee allow the Department to make its case at the January 2005 meeting. He suggested that the Department consider producing additional information, focusing particularly on the character of the actual cases in which it believes a pre-verdict dismissal was improperly granted and the government denied its right to appeal. He added that the Standing Committee might decide to return the proposal to the advisory committee with instructions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 15, 2004. (Agenda Item 5)

Judge Smith explained that it is the policy of the advisory committee for proposed amendments to evidence rules generally to be limited to resolving case law conflicts in the courts. The committee's presumption, thus, is strongly against amending the rules. The four rules amendments recommended for publication, he said, would resolve serious conflicts in the courts.

Amendments for Publication

FED. R. EVID. 404(a)

Judge Smith reported that the proposed amendments to Rule 404(a) (admissibility of character evidence) would resolve a case law conflict regarding the admissibility in a civil case of character evidence offered as circumstantial proof of conduct. He noted that courts routinely admit such information into evidence in criminal cases. A minority of courts have also permitted its use in civil cases. The proposed amendment would allow the evidence only in criminal cases.

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

FED. R. EVID. 408

Judge Smith reported that the proposed amendments to Rule 408 (compromise and offers to compromise) would resolve three important conflicts in the case law as to the admissibility of statements and offers made in settlement negotiations. He added that the proposals had been substantially debated and reworked by the advisory committee.

Judge Smith pointed out that the first amendment would resolve the split in the case law regarding the admissibility in later criminal prosecutions of statements and offers made in civil settlement negotiations. He pointed out that the Department of Justice strongly supported allowing the use in criminal cases of admissions made earlier during settlement negotiations, noting that they can be critical evidence to establish guilt in certain cases. After much debate, he said, the advisory committee agreed to present an amendment that would authorize the use of admissions of fault in later criminal prosecutions, but not allow admission of the fact that there has been a civil settlement or negotiations. He emphasized that the committee had worked hard to reach the proper balance between protecting settlement negotiations and allowing critical evidence to be used in criminal cases.

Second, Judge Smith reported that the proposed amendments would resolve a conflict in case law by prohibiting the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. He noted that the proposal reinforces the main purposes of the rule — to promote unfettered settlement discussions.

Third, the proposed amendments would resolve a conflict over whether offers of compromise may be admitted in favor of the party who made the offer. The proposal would bar a party from introducing its own statements and offers when offered to prove the validity, invalidity, or amount of the claim. Judge Smith said that the advisory committee was of the view that a party should not be able to waive unilaterally the protections of the rule because introduction of the evidence would show implicitly that the opposing party had also entered into a settlement agreement. Exclusion of such evidence would not be required, though, when offered for other purposes, such as to prove the bias or prejudice of a witness.

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

FED. R. EVID. 606(b)

Judge Smith reported that the proposed amendment to Rule 606(b) (juror as a witness) would limit the testimony of a juror regarding the validity of a verdict to whether

there has been a clerical mistake in reporting the verdict. He explained that some courts have also allowed juror tetimony on a broader basis, such as to explore whether the jury understood the court's instructions or the impact of their actions. He added that the proposed amendment is very narrowly designed to protect jury deliberations and prevent invasions of the jury process. He pointed out, however, that testimony could still be allowed from a juror as to fraud or outside influence.

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

FED. R. EVID. 609(a)(2)

Judge Smith reported that Rule 609(a)(2) (impeachment by evidence of conviction of a crime) provides for automatic impeachment of a witness with evidence that the witness has been convicted of a crime that "involved dishonesty or false statement." The problem, he said, is in determining which crimes involve dishonesty or false statement.

Most prior convictions, he noted, occur in other jurisdictions, especially state courts. The issue for the federal court is to determine the extent to which it may look behind the prior conviction to determine whether it involved dishonesty or false statement. Some courts, he said, make the determination by looking only at the actual elements of the crime for which the witness was found guilty. Other courts, though, allow a more detailed inquiry into the facts of the case.

Judge Smith explained that the proposed amendment takes a middle position. It would allow automatic impeachment of a witness if an underlying act of dishonesty or false statement can be "readily determined." Judges, thus, would have discretion to look behind the elements of the crime to the facts of the case. But it is contemplated that their review would be to make a quick determination, such as by reviewing the charging documents, that a crime involved dishonesty or false statement. The court, though, should not conduct a minitrial on the issue. He added that a similar problem exists under the Sentencing Guidelines, where district judges may have to look behind the elements of a crime to determine whether a prior conviction of the defendant had been for a crime of violence. Professor Capra added that the committee note sets forth some examples of key documents that could be used by judges to make the determination of dishonesty or false statement.

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

Informational Items

Professor Capra explained that these four proposals complete a package of amendments that the advisory committee had been considering for several meetings. He said that the advisory committee did not have plans to bring forward to the Standing Committee in the near future other potential amendments that it had under consideration. In addition, he said, the advisory committee would continue to examine the hearsay exceptions, but it will not propose any amendments until the full impact of *Crawford v. Washington* has been determined.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. (Agenda Item 10)

He reported that the E-Government Act of 2002 requires all federal courts to post on the Internet all case documents filed electronically or filed in paper and converted to electronic form. The Act also mandates the promulgation under the Rules Enabling Act of new federal rules addressing security and privacy concerns raised by electronic posting of case documents. The Standing Committee, he noted, had created the E-Government Subcommittee to coordinate the task of drafting appropriate revisions to the rules, and it asked representatives of other Judicial Conference committees to serve on the subcommittee.

He explained that the subcommittee had asked Professor Capra to develop a template that each advisory committee could use to develop appropriate amendments to their own rules. He pointed out that each of the advisory committees had reviewed the template and had raised a number of policy issues. In addition, the Department of Justice and other interested parties had offered practical and helpful comments on the template.

Judge Fitzwater reported that the E-Government Subcommittee met just before the Standing Committee meeting and revised the template in several respects. He emphasized that in making policy choices, the subcommittee had worked from the Judicial Conference's recent privacy policy statements and the assumptions made by the Court Administration and Case Management Committee. The revised template, he said, would now be sent back to the advisory committees for further consideration at their autumn meetings.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, January 13-14, 2005.

Respectfully submitted,

Peter G. McCabe
Secretary

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 17, 2004

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: Legislative Report

Forty-four bills were introduced in the 108th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Crime Victims' Rights

On October 30, 2004, the President signed the "Justice for All Act of 2004." (Pub. L. No. 108-405.) The Act adds a new chapter to Title 18 of the U.S. Code establishing rights for crime victims. Under section 102 of the Act, a crime victim—defined as a person directly and proximately harmed as a result of the commission of a federal felony or misdemeanor offense—is afforded certain rights, including the right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." The provision sets forth rights broader than rights provided crime victims under the proposed amendment to Criminal Rule 32, which was approved by the Judicial Conference in September 2004. To avoid confusion and possible supersession problems, the Judicial Conference—on recommendation from the Committee on Rules of Practice and Procedure—withdrew the proposed amendment to Criminal Rule 32 before it was submitted to the Supreme Court.

If the district court denies any right provided a crime victim under the Act, the victim may petition the court of appeals for a writ of mandamus. Curiously, the Act states that such an order may be issued by a single judge in accordance with a circuit rule or Federal Rule of Appellate Procedure. Appellate Rule 27(c) says, "A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding." And Appellate Rule 47(a) prohibits local rules inconsistent with the federal procedural rules. It is unclear whether the provision is voided by its own terms.

Under the Act, the court of appeals must take up and decide the petition for a writ of mandamus within 72 hours of filing. Unlike Appellate Rule 21(b)(1), which permits the court to deny a petition for writ of mandamus "without an answer," the Act requires the court to state the reasons on the record in a written opinion. Moreover, the 72-hour deadline for a court of appeals to act is too brief and unworkable. It is also problematical because the deadline is set in "hours" instead of days, which is used uniformly throughout the Appellate Rules. It is unclear how the deadline would operate when the time period expires on a weekend or legal holiday. The Act also directs the Administrative Office to report annually to Congress the number of times that a crime victim was denied rights under the legislation and the reason for such denial. (See attached memorandum to courts.)

The Administrative Office advised Congressional staff of the pending amendments to Criminal Rule 32 approved by the Judicial Conference on crime victims' allocution rights. Staff was also advised of concerns about the mandamus and appellate procedures in the Act. A formal response to Congress was not pursued because the Judicial Conference had adopted a resolution on April 14, 1997, expressing a strong preference for a statutory approach to victims' rights over a constitutional amendment. The Conference took no position on the specifics of the proposed legislation. (JCUS-SEP 97, pp. 66-67.) At the Criminal Rules Committee meeting in October 2004, chair Susan C. Bucklew appointed a subcommittee to study whether Criminal Rule 32 needs to be amended in light of the new Act.

9/11 Legislation

On December 17, 2004, President Bush signed the "Intelligence Reform and Terrorist Prevention Act of 2004." (S. 2845, 2nd Sess., 108th Cong.) Section 6501 of the bill amends Criminal Rule 6 to authorize sharing of grand jury information involving terrorist activity with an appropriate federal, state, state subdivision, Indian tribal, or foreign government official.

Section 6501 implements an unexecuted amendment to Rule 6 contained in the Homeland Security Act of 2002 (Pub. L. No. 107-296), which never took effect because it was based on an outdated version of the rule. Ordinarily, the judiciary opposes any proposed legislation directly amending a federal rule inconsistent with the rulemaking process. In this case, however, Congress had earlier exercised its prerogative to amend the rule directly, and the new legislation implemented its prior decision. Nonetheless, a few suggestions were sent to Congressional staff to revise the language consistent with conventions adopted in the restyled Criminal Rules, e.g., substitute "in accordance with" for "pursuant to." The suggestions were not adopted primarily because action on the legislation was moving too fast. The Criminal Rules Committee is expected to consider whether the style changes should be advanced by the rulemaking process as technical amendments.

E-Government Act

Section 205(c) of the E-Government Act of 2002 (Pub. L. No. 107-347) requires, among other things, the Supreme Court to promulgate rules under the Rules Enabling Act to protect the privacy and security of documents filed electronically. Judge Levi established the Subcommittee on E-Government—chaired by Judge Sidney A. Fitzwater and comprised of representatives from the five advisory rules committees and the Committee on Court Administration and Case Management—to develop proposed rule amendments to implement the E-Government Act. A template privacy rule was prepared by Professor Daniel Capra for the advisory committees' consideration. It was revised to account for amendments to the E-Government Act enacted on August 2, 2004, which authorize a party to file, under seal, an unredacted version of the document (with the redacted version available for public use) or a reference list that identifies redacted information, which can be accessed by the parties and court. (Pub. L. No. 108-281.)

At their fall 2004 meetings, the Appellate, Bankruptcy, Civil, and Criminal Advisory Rules Committees considered the revised template privacy rule and specific modifications addressing issues affecting only their set of rules. The advisory rules committees suggested amendments to the template rule, which Professor Capra incorporated in the template rule. (The Appellate Rules Committee agreed to adopt a "dynamic conformity" rule, which will adopt by incorporation the Civil and Criminal Rules provisions.) The revised template rule is presented as an informational item for the Standing Committee's consideration at its January 2005 meeting.

Civil Rule 11

On June 15, 2004, Representative Smith introduced the "Lawsuit Abuse Reduction Act of 2004." (H.R. 4571, 2nd Sess., 108th Cong.) The bill would, among other things, amend Civil Rule 11 to require the court to impose sanctions for every violation of the rule. (H.R. 4571 would reinstate sanction provisions that were deleted in 1993.) The bill also applies amended Rule 11 to state cases affecting interstate commerce, alters the venue standards for filing tort actions in state and federal court, requires the court to suspend an attorney from the practice of law before the federal district court for at least one year if the attorney violated Rule 11 three or more times, and requires a court—either state or federal—to sanction any person who willfully and intentionally impedes a pending court proceeding through the willful and intentional destruction of documents relevant to that proceeding. On July 9, 2004, Director Mecham sent a letter to Chairman Sensenbrenner opposing H.R. 4571. In addition, the American Bar Association sent a letter to each Member of Congress opposing the bill. (See attached.) The House passed the bill on September 14, 2004, by a vote of 229-174.

The bill was referred to the Senate. On September 16, 2004, Director Mecham wrote to Chairman Hatch opposing the legislation. (See attached.) There has been no further action on the bill.

Criminal Rule 11

On June 14, 2004, Representative Sensenbrenner introduced the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004." (H.R. 4547, 2nd Sess., 108th Cong.) The legislation would, among other things, amend Criminal Rule 11 to impose conditions on a court before it could accept a plea agreement. The conditions were designed to ensure that every plea agreement accepted by a court is consistent with the Federal Sentencing Guidelines. For example, a court would be required to make specific findings that certain plea agreements adequately reflect the "seriousness of the actual offense behavior."

On September 20, 2004, Director Mecham sent a letter to Representative Coble, chairman of the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security, opposing, among other things, the Rule 11 provision. (See attached.) On September 23, 2004, the subcommittee deleted the Rule 11 provision from the bill during a mark-up session.

Sealed Settlement

On April 8, 2003, Senator Kohl reintroduced the "Sunshine in Litigation Act of 2003." (S. 817, 1st Sess., 108th Cong.) The bill provides that a court may not enter an order that would, among other things, approve a settlement agreement that limits disclosure of the agreement unless the court makes specific findings concluding that the litigants' privacy interests outweigh the public's interest in safety and public health.

In October 2002, Director Mecham wrote to Senator Kohl advising him that the Civil Rules Committee was considering confidentiality provisions in settlement agreements as part of its ongoing study of issues arising from sealed settlement agreements. In December 2003, Director Mecham provided Senator Kohl with an interim report on the status of the empirical study of court orders sealing settlement agreements undertaken by the Federal Judicial Center. The results of the final report were sent to Senator Kohl on November 17, 2004. (See attached.) There has been no further action on the bill.

Blakely v. Washington

On November 16-17, 2004, the United States Sentencing Commission held a public hearing in Washington, D.C., to discuss the Federal Sentencing Guidelines in the aftermath of the Supreme Court's decision in *Blakely v. Washington*. Judge Bucklew appeared and testified before the Commission on November 16, 2004. (A transcript of the proceedings is available at <www.ussc.gov>.) Judge Bucklew appointed a subcommittee to study *Blakely*-related issues and

recommend proposed rules amendments depending upon the outcome of *United States v. Booker* and *United States v. Fanfan*, currently under consideration by the Supreme Court.

James N. Ishida

Attachments

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 15, 2004

MEMORANDUM TO: JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
CIRCUIT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS OF APPEALS
CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: "Justice for All Act of 2004" (**INFORMATION**)

The Justice for All Act of 2004 (Pub.L. 108-405) (Act) was signed into law by the President on October 30, 2004, and it provides for crime victims' rights and enhanced DNA collection, testing and training. It amends title 18 of the United States Code (U.S.C.) by adding Chapter 237, section 3771 ("Crime victims' rights"), and Chapter 228A, sections 3600 ("DNA testing") and 3600A ("Preservation of biological evidence"). This Act also amends 42 U.S.C. § 14135a(d)(1) and 10 U.S.C. 1565(d) to expand the list of qualifying federal and military offenses that trigger the collection of DNA samples. With respect to crime victims' rights, this legislation also establishes annual reporting requirements for the federal courts, which are described below.

Crime Victims' Rights

Section 102 of the Act provides the following rights to victims of federal crimes[1]:

(1) The right to be reasonably protected from the accused.

[1] Under the Act, the Department of Justice and other law enforcement departments and agencies of the United States are required to make their best efforts to see that crime victims are notified of, and accorded, the rights described in this section. However, it may be advisable for courts to inquire during arraignments, guilty plea proceedings and sentencings in applicable cases as to whether crime victims have been notified of their rights.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

These rights may be asserted by the crime victim or the victim's representative, and the attorney for the government. The courts are required to make every effort to ensure these rights and permit the fullest possible attendance at court proceedings affecting crime victims. In cases involving multiple victims too numerous to be accorded all of these rights individually, courts are permitted to fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings.

If a crime victim is denied any of these rights or excluded from a court proceeding, the court must state the reason(s) on the record. In addition, if a district court denies any of these rights, either the victim or the government may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals must take up and decide such a petition within 72 hours of the filing, and in no case shall the proceeding be stayed or continued more than five days. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

A court's denial of any of these rights to a crime victim would not constitute grounds for a new trial. However, a crime victim may make a motion to re-open a plea or sentence if a timely asserted right to be heard was denied, the victim petitions the court of appeals for a writ of mandamus within 10 days, and, in the case of a plea, the accused has not pled to the highest offense charged.

The Act also establishes reporting requirements for the Administrative Office of the United States Courts (AO) with respect to the activities of each federal court affecting crime victims' rights. Specifically, the AO must report annually to Congress the number of times that a right established under this Act is asserted in a criminal case and the relief requested is denied, the reason for each such denial, as well as the number of times a mandamus action is brought and the result reached.

Accordingly, effective October 30, 2004, I am requesting that each federal district court provide to its respective Clerk's Office a copy of the order in any criminal case where a crime victim sought relief under the Act and the request was denied. Orders denying such requests should also include the reason(s) for the denial. Similarly, courts of appeals should compile the number of mandamus actions filed pursuant to the Act and the results, including copies of written opinions stating the reasons for denial of any relief sought.

Circuit and district court clerks should provide copies of these orders, opinions and statistical data as expeditiously as possible to Steven Schlesinger, Chief, Statistics Division. This information can be sent via e-mail to Steven Schlesinger/DCA/AO/USCOURTS or facsimile to (202) 502-1411. Also, you may contact Mr. Schlesinger by telephone at (202) 502-1440 if you have any questions about these reporting requirements.

DNA Collection

The DNA provisions of the Act address three concerns. First, they provide resources to help eliminate the large backlog of DNA evidence that has not been analyzed and remedy the lack of training, equipment, technology and standards for handling DNA and other forensic evidence. They also expand the list of qualifying federal and military offenses that trigger the collection of DNA samples, which applies both to instant and prior convictions of these federal and military offenses. Following is the list of federal offenses, as determined by the Attorney General:

(1) Any felony.

(2) Any offense under chapter 109A of title 18, United States Code.

(3) Any crime of violence (as that term is defined in section 16 of title 18, United States Code).

(4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).

The list of qualifying military offenses is as follows, as determined by the Secretary of Defense, in consultation with the Attorney General:

(1) Any offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed.

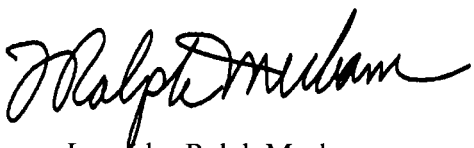
(2) Any other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135(a)(d))).

Second, the provisions authorize funding for training of law enforcement, court, corrections and forensic science personnel on the use of DNA evidence; and authorize grant programs to reduce other forensic science backlogs, research new DNA technology, promote the use of DNA technology to identify missing persons, and provide funds to the FBI for the administration of its DNA programs.

Third, these provisions establish rules for post-conviction DNA testing of federal prison inmates and require preservation of biological evidence in federal criminal cases while the defendant remains incarcerated; provide incentive grants to states that adopt procedures for post-conviction DNA testing and preserving biological evidence; authorize funding to help states provide competent legal services for both the prosecution and defense in death penalty cases; and provide funding for post-conviction DNA testing.

Specifically, as to post-conviction DNA testing, the Act provides for testing of evidence pertaining to 1) the federal offense for which the applicant is under a sentence of imprisonment or death, or 2) another federal or state offense if evidence of such offense was admitted during a federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing. In the case of a state offense, the applicant must also demonstrate that no adequate remedy exists under state law to permit DNA testing and that the applicant has exhausted all remedies available under state law for requesting such testing. The Act also provides for appointment of counsel for an indigent applicant in the same manner as in a proceeding under 18 U.S.C. § 3006A(a)(2)(B), which gives federal courts discretion to appoint counsel in the interest of justice for a financially eligible person who is convicted of a federal crime and is applying to the federal court for habeas corpus relief, including DNA testing in connection with that conviction.

Thank you for your attention to this and for your assistance in advance regarding the AO's annual reporting requirement to Congress on actions in the federal courts affecting crime victims' rights.



Leonidas Ralph Mecham

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 16, 2004

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

On behalf of the Judicial Conference, I write to urge you to oppose the "Lawsuit Abuse Reduction Act of 2004" (H.R. 4571). The House of Representatives passed the bill on September 14, 2004.

Section 2 of the bill would reinstitute a sanctions provision of Rule 11 of the Federal Rules of Civil Procedure that was eliminated in 1993 on the recommendation of the Judicial Conference, with the approval of the Supreme Court and after review by Congress. The provision was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address and generated wasteful satellite litigation that had little to do with the merits of a case. The proposal conflicts with the view of a majority of federal judges (70%) surveyed by the Federal Judicial Center in 1995, who supported Rule 11 as amended in 1993.[1] The amendment of Rule 11 would also be inconsistent with the longstanding Judicial Conference policy opposing direct amendment of the federal rules by legislation.

Section 3 of H.R. 4571 would apply the revised federal Rule 11 to certain state court actions, while section 4 would amend the venue standards governing the filing of tort actions in both the federal and state courts. Sections 3 and 4 implicate federal-state comity interests and raise important policy and practical concerns. Sections 6 and 7 were added at the House

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[1]The 1995 study was conducted after the most recent amendments to Rule 11 took effect in 1993. The study superseded a 1991 survey of federal judges who at that time concluded (about 80%) that the 1983 rule was "slightly or moderately effective in deterring groundless papers, but ... found other methods more effective for handling such litigation."

Judiciary Committee's mark-up session held on September 8, 2004. Section 6 would require a court to suspend an attorney from practicing law before the federal district court for at least one year after that attorney had violated Rule 11 three or more times. Section 7 would require that every court, state or federal, impose a civil sanction on any person who willfully or intentionally destroys a relevant document in order to impede, obstruct, or influence a court proceeding.

Section 2

Section 2 would directly amend Civil Rule 11 to remove a court's discretion to impose sanctions on a frivolous filing and eliminate the rule's "safe-harbor" provisions. The bill undoes amendments to Rule 11 that took effect on December 1, 1993. The bill would bring back the provisions that were first enacted in 1983 and removed from the rule in 1993, after a decade of signally bad experiences with the operation and effects of the 1983 rule.

Like H.R. 4571, the 1983 version of Rule 11 required sanctions for every violation of the rule. Like H.R. 4571, the 1983 version of Rule 11 was intended to address certain improper litigation tactics by providing some punishment and deterrence. The effect was almost the opposite. The 1983 rule presented attorneys with financial incentives to file a sanction motion. The rule was abused by resourceful lawyers, and an entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims or with the behavior it attempted to regulate. Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion. The 1983 version of Rule 11 spawned thousands of court decisions, sowed discord in the bar, and generated widespread criticism.

The serious problems caused by the 1983 amendments to Rule 11 included:

(1) creating a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty;
(2) engendering potential conflict of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;
(3) exacerbating tensions between lawyers; and
(4) providing little incentive, and perhaps a distinct disincentive, to abandon or withdraw a pleading or claim — and thereby admit error — that lacked merit after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. The rule establishes a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees.

Rule 11 does not supplant other remedial actions available to sanction an attorney for a frivolous filing, including punishing the attorney for contempt, employing sanctions under 28 U.S.C. § 1927 for "vexatious" multiplication of proceedings, or initiating an independent action for malicious prosecution or abuse of process.

The 1983 Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees. Section 2 of the bill would reinstate the 1983 provision, adding needless confusion and unnecessary litigation. A Federal Judicial Center study conducted in 1991 found that under the 1983 version, Rule 11 issues could be expected to be raised in 2%-3% of the cases filed in federal court. If the same experience emerged under a new Rule 11, at current caseloads, a Rule 11 issue could be expected to arise in 5,000 to 7,600 cases, representing a tremendous drain on already stretched judicial resources.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee on Civil Rules (Advisory Committee) reviewed a significant number of empirical examinations of the 1983 Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987. The Advisory Committee took note of several book-length analyses of Rule 11 case law.

The 1991 Federal Judicial Center survey noted that most federal judges believed that the 1983 version of Rule 11 had some positive effects. But the study also noted that most judges found several other methods more effective than Rule 11 in handling such litigation and, most significantly, that about one-half of the judges reported that Rule 11 exacerbated undesirable litigation behavior by counsel. After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial, calling for a change in the rule.

The Rules Committees concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process (28 U.S.C. §§ 2071-2077).

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more

than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated. A majority of the judges and lawyers, both plaintiffs' and defendants' lawyers, believed that groundless litigation was handled effectively by judges.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Judicial Conference rules committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. Section 2 of H.R. 4571 would effectively reinstate the 1983 version of Rule 11 that proved so contentious and wasted so much time and energy of the bar and bench. Section 2, indeed, in some ways seems to go beyond the provisions that created serious problems with the 1983 rule. It may cause even greater mischief. Rule 11 in its present form has proven effective and should not be revised.

Sections 3 and 4

Section 3 would extend the new requirements of a mandatory Rule 11 to all state court litigation that the state court deems, on motion, to affect interstate commerce. Two features of this provision stand out. First, it would directly regulate the practice and procedure of state courts, mandating a federal standard for the imposition of sanctions for the filing of frivolous or ungrounded complaints and other papers in state court. At present, states have been free to adopt their own rules of practice, including a version of Rule 11, if a state so chooses. Second, section 3 does not specify the actions to which it would apply. Rather, it imposes on state judges a broad generalized test to determine whether federal Rule 11 would apply in a given case. If enacted, this section could affect the cost and duration of a very large number of civil actions in state courts.

Section 4 seeks to prevent forum-shopping by specifying the places where a plaintiff may bring a "personal injury" claim by imposing a federal standard for determining the venue of state law personal injury claims, in both state and federal court. Such a federal standard would displace existing state venue rules or statutes. It would also significantly alter the statutes in title 28, United States Code, that now govern venue (section 1391) and transfer of venue (section 1404) in the federal courts. The Judicial Conference has not had an opportunity to study either section 3 or section 4.

Sections 6 and 7

A federal district court must suspend an attorney from the practice of law in the district under section 6 if the attorney has violated Rule 11 three or more times. The Judicial Conference has not had an opportunity to study this provision. The provision raises important questions concerning the regulation of the practice of law, an area largely reserved to the state courts. Most federal courts do not have an administrative process or records-keeping system in place to handle the sanctioning of attorneys. The additional burdens that the proposed provision would impose

on courts have not been examined. But even if the ambiguous language of the bill requires suspension only if the prior Rule 11 violations have been adjudicated by earlier court orders, mandatory suspension will raise the stakes of the third Rule 11 proceeding, create powerful strategic incentives on all sides, and transform the already burdensome character of Rule 11 satellite litigation.

Section 7 establishes a stand-alone statutory provision that would sanction any person who "willfully and intentionally influences, obstructs, or impedes, or attempts to influence, obstruct, or impede, a pending court proceeding through the willful and intentional destruction of documents sought in, and highly relevant to, that proceeding...." The Judicial Conference has not had an opportunity to study the provision. Presently, Civil Rule 37 and the common law provide the courts with a broad range of potential sanctions for the spoliation of relevant evidence and repose considerable discretion in the district courts in the selection of the appropriate sanction when spoliation is found. Section 7 would impose a mandatory civil sanction "of a degree commensurate with the civil sanctions available under Rule 37." The likely effects of such a provision have not been studied. But it undercuts the current rule's reliance on the discretion of the trial court judge, a hallmark of present practices. Given the broad range of sanctions authorized under Rule 37, compliance with section 7 may prove particularly problematical for state courts commanded to identify the sanction "commensurate" with those provided by Rule 37, which does not necessarily apply in state court. There is also a serious question about how a "commensurate" Rule 37 sanction can be imposed on nonparties.

The provision raises additional questions. For example, virtually every corporation and government office recycles back-up tapes as part of the routine and necessary operation of its computers. Would the proposed provision make that sanctionable in every instance? The Committee on Rules of Practice and Procedure published for comment proposed amendments to the civil rules addressing this thorny issue in August 2004. Like the mandatory sanction provision that provided financial incentives to file numerous and ill-founded motions under the 1983 version of Rule 11, this mandatory sanction provision may also lead to wasteful satellite litigation, without providing meaningful or useful tools to police the behavior it is meant to address.

Conclusions

The Judicial Conference opposes the enactment of H.R. 4571 for the reasons stated above as to section 2. Sections 3, 4, 6, and 7 would make important changes in the administration of civil justice in both federal and state courts. The Judicial Conference has not had the opportunity to formally assess the advisability or impact of these sections, but notes that they may substantially affect federal-state comity interests and raise important policy and practical concerns.

The Judicial Conference greatly appreciates your consideration of its views. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick Leahy, Ranking Democrat
Members of the Committee on the Judiciary of the Senate

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September 10, 2004

Dear Representative:

I am writing to you regarding H.R. 4571, legislation to make changes in Rule 11 of the Federal Rules of Civil Procedure; make an amended Rule 11 of the Federal Rules of Civil Procedure applicable to cases filed in state courts if such cases affect interstate commerce; and make changes relating to jurisdiction and venue for personal injury cases filed in state and federal courts. We understand that the legislation will be brought to the floor of the House of Representatives next week.

The ABA opposes the provisions in the legislation that would change the Federal Rules of Civil Procedure without going through the process set forth in the Rules Enabling Act. The ABA fully supports the Rules Enabling Act process, which is based on three fundamental concepts: (1) the central role of the judiciary in initiating judicial rulemaking, (2) procedures that permit full public participation, including by the members of the legal profession, and (3) recognition of a congressional review period. We view the proposed rules changes to the Federal Rules in H.R. 4571 as an unfortunate retreat from the Rules Enabling Act.

In 28 U.S.C. §§ 2072-74, Congress prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, Congressionally-specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, will then be submitted to the United States Supreme Court for consideration and promulgation, and will finally be transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

1) Rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis;

2) Each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences; and

3) The Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

We do not question Congressional power to regulate the practice and procedure of federal courts. Congress exercised this power by delegating its rulemaking authority to the judiciary through the enactment of the Rules Enabling Act, while retaining the authority to review and amend rules prior to their taking effect. We do, however, question the wisdom of circumventing the Rules Enabling Act, as H.R. 4571 would.

We also have serious concerns about the provisions in H.R. 4571 that would impose the Federal Rules on the state courts and would impose the changes relating to jurisdiction and venue for personal injury cases filed in state and federal courts. We hope the House will not move forward on legislation containing such departures from current law until we and others have had sufficient time to analyze the impact they would have on the state courts and on the principle of federalism and are able to present our views to you on these very important matters.

We respectfully urge you to vote "no" on this legislation.

Sincerely,

Robert D. Evans

Robert D. Evans

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 20, 2004

Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
207 Cannon House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the views of the Judicial Conference of the United States with regard to H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004," as introduced on June 14, 2004.

This bill moves sentencing law in a diametrically opposite direction from that required for the fair and responsible administration of criminal justice in the federal courts. Rather than restoring the authority of judges to tailor sentences to the circumstances of individual offenses and offenders, which was significantly curtailed by the PROTECT Act,[1] this bill would further restrict the discretion of sentencing judges and thereby result in sentences that do not fit the crimes. The specific concerns and recommendations of the Judicial Conference are detailed below.

Mandatory Minimums

Various provisions of this legislation would expand the application of mandatory minimum sentences by creating new penalties, increasing existing penalties, or expanding the scope of offenses that expose defendants to such sentences. Specifically, the bill would:

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[1] Pub. L. No. 108-21, 117 Stat. 650 (2003).

- raise the mandatory minimum sentence for distribution of a controlled substance to a person under 21 years of age from 1 year to 5 years for a first offense, and from 1 year to 10 years for subsequent offenses (sections 2(a) and (b));

- establish a new mandatory minimum sentence of 10 years for a first offense of distribution of a controlled substance if the defendant is 21 years of age or older and the person to whom the distribution is made is under 18 years of age, and mandatory life imprisonment for a second offense (sections 2(a) and (b));

- expand the scope of offenses carrying mandatory minimum sentences with regard to distribution of controlled substances within 100 feet of schools, colleges, public housing, or facilities frequented by youths, by adding public libraries and daycare facilities to the list of protected facilities and by expanding the protected zone from 100 feet to 1000 feet, and increase the mandatory minimum sentence for the first of such offenses from 1 year to 5 years and for the second and subsequent offenses from 3 years to 10 years (sections 2(c) and (d));

- establish a new mandatory minimum sentence of 10 years for the first offense of employing a person under 18 years of age in drug distribution or manufacturing within 1000 feet of a protected facility, 15 years for the second offense, and mandatory life imprisonment for the third offense under certain circumstances (section 2(e));

- increase the mandatory minimum sentence for the first offense of employing a person under 18 years of age in a drug operation from 1 year to 5 years (section 2(i)), and for the second and subsequent offenses from 1 year to 10 years (section 2(j));

- establish a new mandatory minimum sentence of 5 years for distribution of a controlled substance to a person under 18 years of age in the course of employing such person in a drug operation (section 2(k));

- establish a new mandatory minimum sentence of 5 years for the manufacture or distribution of a controlled substance within 1000 feet of a drug treatment facility (section 4(a));

- establish a new mandatory minimum sentence of 5 years for the first offense of offering a controlled substance to a person enrolled or previously enrolled in a drug treatment program or facility, and 10 years for second and subsequent offenses; in those instances in which serious bodily injury or death results from the use of such substance, the first offense would carry a mandatory minimum sentence of 10 years, and the second offense would result in life imprisonment (section 4 (a)); and

- establish a mandatory minimum sentence of 3 years for creating a substantial risk of harm to human life due to possession or storage of harmful substances or chemicals used in the manufacture of controlled substances, and 5 years if the risk is posed to minors (section 11).

The Judicial Conference has repeatedly expressed strong opposition to mandatory minimum sentences because they severely distort the federal sentencing system. Mandatory minimums also undermine the sentencing guideline regimen Congress carefully established under the Sentencing Reform Act of 1984 by preventing the rational and systematic development of guidelines that reduce unwarranted disparity and provide proportionality and fairness in punishment.

The United States Sentencing Commission has determined that mandatory minimum sentences skew the "finely calibrated...smooth continuum" of the sentencing guidelines, preventing the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[2] This pernicious effect of mandatory minimums stems from the fact that such provisions create dramatic discrepancies in sentences between defendants who fall just below the threshold of a mandatory minimum and defendants whose criminal conduct meets the statutory criteria. This "cliff" effect impedes the design of a guideline scheme that rationally enhances punishment according to the dangerousness of the underlying conduct.[3]

In addition to resulting in unwarranted sentencing disparities, mandatory minimums often lead to the treatment of dissimilar offenders in a similar manner by requiring courts to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment to reflect differences in the seriousness of the conduct or danger to society.

Thus, mandatory minimums have the dual untoward effect of subjecting similar offenders to dramatically different sentences and dissimilar offenders to substantially similar sentences. Chief Justice Rehnquist has stated that mandatory minimums are "a good example of the law of

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[2] U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory Minimum Sentencing*: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

[3] By way of example, a first-time offender convicted of simple possession of 5.01 grams of crack cocaine is subject to a mandatory minimum sentence of 5 years. In contrast, had the offender possessed only 5.0 grams of crack cocaine (one-hundredth of a gram less), the mandatory minimum sentence would not apply, subjecting the defendant to a maximum sentence of 1 year. *See* 21 U.S.C. § 844(a).

unintended consequences [and] frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."[4]

These provisions of the bill seriously aggravate the problems created by mandatory minimums by widening their scope and application. We urge that the Subcommittee delete these provisions from the bill, initiate legislation to repeal all current mandatory minimums, and allow the sentencing guidelines and the Sentencing Commission to operate in the fair and effective manner envisioned by the Sentencing Reform Act of 1984.

Sentencing Guidelines

Various provisions of this legislation either directly amend the sentencing guidelines or impose specific direction upon the United States Sentencing Commission so as to be tantamount to direct amendment of the guidelines. Specifically, the bill would:

- directly amend the sentencing guideline regarding the "mitigating role" of a defendant (section 3);

- direct the Sentencing Commission to amend the guideline regarding drug conspiracy offenses in a specified manner (section 5);

- direct the Sentencing Commission to amend the guidelines in a specified manner so as to assure sentencing enhancement for "relevant conduct" (section 7); and

- direct the Sentencing Commission to amend the guidelines in a specified manner to ensure progressive enhancements for persons possessing or using firearms (section 8).

The Judicial Conference opposes direct congressional amendment of the sentencing guidelines because such amendments undermine the basic premise underlying the establishment of the Sentencing Commission – that an independent body of experts appointed by the President and confirmed by the Senate, operating with the benefit of the views of interested members of the public and both public and private institutions, is best suited to develop and refine such guidelines. We recommend that these provisions of the bill be amended to direct the Sentencing Commission to study the amendment of these guidelines and either adjust the guidelines or report to Congress the basis for its contrary decision.

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[4] Chief Justice William H. Rehnquist, Address at the National Symposium on Drugs and Violence in America (June 18, 1993).

Safety Valve

Several provisions of this legislation diminish the availability of the statutory safety valve provision[5] and the corresponding sentencing guidelines.[6] Specifically, the bill would:

- amend one of the five current statutory safety valve criteria to preclude safety valve relief unless: (1) the government certifies that the defendant pleaded guilty to the most serious, readily provable offense, and (2) the defendant did not "at any time" provide false, misleading, or incomplete information or substantial assistance that was untimely (section 6);

- add an additional statutory criterion requiring a finding that neither the offense nor the relevant conduct occurred in or near the presence or residence of a minor, or constituted any of several offenses regarding protected persons and places (section 2(*l*)(2));

- require the Sentencing Commission to amend the guidelines to make the safety valve unavailable if the offense or relevant conduct occurred in or near the presence or residence of a minor, or constituted any of several offenses regarding protected persons or places (section 2(*l*)(1)); and

- delete sentencing guideline § 2D1.1(b)(6), which requires a two-level decrease for defendants satisfying the safety valve criteria (section 3(a)).

Congress enacted the safety valve provision in 1994 with the support of the Judicial Conference to ameliorate some of the harshest results of mandatory minimums by permitting judges to apply the sentencing guidelines instead of the statutory minimum sentences in cases of certain first-time, non-violent drug offenders. This bill proposes to greatly diminish the availability of the safety valve. For example, the bill would disqualify defendants from safety valve eligibility if they exercised their constitutional right to a trial. Even if a defendant pleaded guilty, the bill would foreclose a district judge from considering safety valve relief unless the government certified that the defendant pleaded guilty to the most serious, readily provable offense. Such a provision would allow the government to withhold the necessary certification on the grounds that the defendant did not plead guilty "to the most serious readily provable offense," notwithstanding that it had opted to bargain away that offense.

Because these provisions of the bill would give additional unwarranted authority to prosecutors to influence sentences and would expose more defendants to mandatory minimum

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[5] 18 U.S.C. § 3553(f).

[6] USSG §§ 2D1.1(b)(6) and 5C1.2.

sentences and constitute direct amendments of the sentencing guidelines, the Judicial Conference urges that they be deleted from the legislation.

Plea Agreements

Section 9 of H.R. 4547 would directly amend Rule 11 of the Federal Rules of Criminal Procedure to impose conditions on a court before it may accept a plea agreement. The conditions are designed to ensure that the acceptance of every plea agreement is consistent with the "statutory purposes of sentencing and the sentencing guidelines." The Judicial Conference has not taken a position on the merits of the specific proposed amendments. But passage of the legislation would thwart the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

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

The amendments to Criminal Rule 11 under section 9 of the bill appear to codify present practices of the courts. But the amendments affect procedures at the core of the judicial process and must be carefully examined, particularly because the vast majority of criminal cases are disposed of in federal court by plea agreements. Rule 11 contains sensitive provisions that have been contested by thousands of litigants and parsed by courts in thousands of written opinions. Every change to the rule has been carefully considered because, no matter how apparently straightforward, it may have significant unintended consequences.

The exact language of the amendments in H.R. 4547 raises issues that are precisely the type best suited to be vetted under the rulemaking process. For example, the legislation requires a court to accept a plea agreement under Rule 11(c)(1)(A) in which the government agrees not to bring charges or dismiss charges only after the court makes specific findings that the plea agreement adequately reflects the "seriousness of the actual offense behavior." The procedures governing plea agreements under Rule 11 apply to all criminal cases, including petty offenses, like immigration and minor traffic offenses committed on federal property. In these cases, a presentence report may not be available to assess the defendant's actual offense behavior. Whether meeting the conditions imposed under the amendments in these high-volume cases would unduly interfere with the efficient administration of justice and impose additional budgetary requirements on an already overworked probation and pretrial services system is not

clear and is worthy of study. Undertaking the rulemaking process may identify and resolve other unforeseen issues and problems with the amendments.

Direct amendment of Rule 11 circumvents the careful rulemaking process established by Congress. The Judicial Conference has a longstanding policy opposing legislation directly amending the federal rules outside the rulemaking process, and consistent with this policy it opposes section 9 of the bill.

We appreciate this opportunity to provide the views of the Judicial Conference on this significant legislation. If you have any questions, please have your staff contact Michael W. Blommer, Assistant Director, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Bobby Scott
Ranking Minority Member

Members, House Judiciary Subcommittee on
Crime, Terrorism and Homeland Security

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 17, 2004

Honorable Herb Kohl
United States Senate
380 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

On December 16, 2003, I wrote to you about the work of the Advisory Committee on Civil Rules on the proposal to regulate confidentiality provisions in settlement agreements set out in the "Sunshine in Litigation Act of 2003" (S. 817, 108th Cong., 1st Sess.).

To address the concerns raised in the bill, the Advisory Committee asked the Federal Judicial Center to collect and analyze data on the practice and frequency of sealing orders limiting disclosure of settlement agreements in the federal courts. In my December 2003 letter, I advised you of the Center's preliminary findings based on data from 29 federal district courts. In April 2004, the Center completed its study after surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. I am pleased to enclose a copy of the Center's final report.

In those 52 districts, the Federal Judicial Center found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, approximately one in 227 cases (0.44%). The findings in the Center's final report do not materially vary from the preliminary findings provided in my December 2003 letter. After reviewing all the information from the 52 districts, the Center concluded that most settlement agreements are neither filed with a court nor require court approval. Instead, most settlement agreements are private contractual obligations. Such agreements would not be affected by provisions like those in the proposed Sunshine in Litigation Act prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

The Advisory Committee was concerned that even though the number of cases in which courts seal settlement agreements is small, those cases could involve significant public hazards concealed through sealed agreements. A follow-up study was undertaken to determine whether in these cases, there is publically available information about potential hazards contained in other

records, which are not sealed.[1] The follow-up study revealed that in the few cases involving a potential public hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the allegedly defective nature of a harmful product, dangerous characteristics of a person, or the lasting effects of a particular harmful event.[2] These findings from the follow-up study were consistent with the general conclusions of the Federal Judicial Center study, that complaints provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Advisory Committee also considered the effectiveness of a federal rule regulating the small number of settlement agreements filed and sealed in federal courts. As noted, most settlement agreements are not filed with the court at all and remain private contracts between the parties. On occasion, parties file a settlement agreement with the court. In most of these cases, the parties do so only to make the settlement agreement part of the court's judgment and ensure continuing federal jurisdiction, not to secure court approval of the settlement. Ordinarily a federal court has no jurisdiction to enforce an agreement that settles a federal-court action unless the agreement is made part of the court's judgment.[3] Otherwise, later interpretation and enforcement of the agreement would take place in state court under state law. A federal court would be involved only if there is diversity jurisdiction and would apply state law to the agreement, including to any provisions requiring confidentiality. The Federal Judicial Center study shows that parties file only a small fraction of the agreements that settle federal-court actions. A federal rule of procedure governing the few settlement agreements that are filed in federal court would not apply to, and could not effectively regulate, the private nature of the vast majority of settlements.

The Advisory Committee reviewed the thorough and detailed Federal Judicial Center study at its meeting on October 28-29, 2004. Based on the relatively small number of cases involving a sealed settlement agreement, the availability of other sources, including the

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[1]The follow-up study examined the data available in the preliminary Federal Judicial Center report. At that time, the study had completed a review of the docket sheets of over 128,000 civil cases in 29 district courts.

[2]Of the 109 public interest cases identified in the preliminary report, only one involved a sealed complaint. In its final report, the Federal Judicial Center study found that the complaints were available to the public in 97% of the cases with sealed settlement agreements – 1,234 of the 1,270 cases.

[3]*See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381-382 (1994). *See also Union Oil Co. of California v. Leavell*, 220 F. 3d 562, 567-568 (7th Cir. 2000) (sealed case-file records are presumptively open to public in later litigation seeking to enforce settlement terms, unless court agrees to continue confidentiality).

complaint, to inform the public of potential hazards in cases involving a sealed settlement agreement, and the questionable authority and ability of the Committee to regulate confidentiality provisions enforced by state substantive law, the Committee concluded that no amendment to the Federal Rules of Civil Procedure is appropriate.

Scope of Study

The docket sheets of 52 district courts, which record all actions in proceedings in every civil case filed, were electronically searched to locate and identify by name each case that included a sealed settlement agreement. The docket sheets of civil cases terminated during a two-year period in these districts were reviewed and cases were identified involving a sealed settlement agreement. A summary of the claim in each of the cases was prepared. The cases in which the claim might possibly implicate public health or safety, broadly defined, were tagged. In a follow-up study of these tagged cases, the plaintiffs' complaints, which were available to the public, were manually reviewed and analyzed to determine whether they contained information sufficient to alert the public of a possible health or safety hazard.

The Federal Judicial Center's report also included a survey of state laws and rules governing settlement agreements, which I reported to you in the December letter. State laws, state court rules, and federal district court rules were surveyed to determine the extent to which existing statutes and rules regulate sealed settlement agreements filed with the courts.

Highlights of Findings

The Federal Judicial Center found that 1,270 cases involved a sealed settlement agreement, which represented a minute fraction of the total number of cases filed in the federal courts. That number would be smaller still if the 177 cases that were part of two MDL (multi-district litigation) cases were excluded. Importantly, the rate of sealed settlements in 11 districts whose local rules require good cause to seal a document (0.37%) was not statistically significantly different from the sealed settlement rate in other courts (0.45%). In fact, the settlement rate was virtually identical if the 177 cases, which were part of two MDL cases but counted separately for purposes of the report, are excluded (0.38% versus 0.37%). Three district courts had sealed-settlement rates more than twice the national rate, including Pennsylvania Eastern, Hawaii, and Puerto Rico. But the Pennsylvania Eastern number included 144 cases disposed of in a single MDL action.

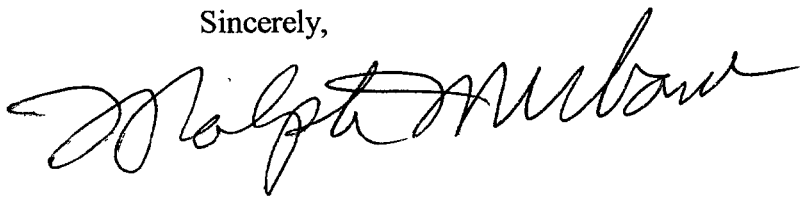
The Federal Judicial Center study analyzed the 1,270 sealed settlement cases to determine how many of them involved matters of public interest. The Center coded the cases for the following characteristics, which might implicate public health or safety interests, or more general interests: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.17% of

all filed cases) bore one or more of the public-interest features, including 177 cases that were part of two MDL cases.

An earlier study of the partial data compiled by the Federal Judicial Center supported the conclusions that sealed settlement agreements do not substantially affect public awareness of possible health and safety hazards.[4] Plaintiffs' complaints in the sealed settlement cases that involved a "public interest" provided significant notice to the public. Although the complaints varied in level of detail, all of them identified the three most critical pieces of information regarding the possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product liability suits, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, e.g., civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the incident alleged to have caused harm.

The Advisory Committee on Civil Rules will continue to monitor courts' practices in this important area. Please feel free to contact Michael W. Blommer, Assistant Director, Administrative Office of the United States Courts, at (202) 502-1700, if you have any questions about this letter.

Sincerely,



Leonidas Ralph Mecham
Secretary

Enclosures

cc: Honorable Orrin G. Hatch
Honorable Patrick Leahy
Honorable Jeff Sessions
Honorable Charles E. Schumer

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[4]The study was performed by Steven Gensler, a professor at the University of Oklahoma Law School who was serving as a judicial fellow to the Administrative Office of the United States. Professor Gensler reviewed and analyzed the complaints filed in the 109 sealed settlement cases involving a "public interest" identified by the Federal Judicial Center in its preliminary report.

Sealed Settlement Agreements in Federal District Court

FEDERAL JUDICIAL CENTER
2004

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
108th Congress

SENATE BILLS

● S. 12 - *A Bill to Amend the Procedures that Apply to Consideration of Interstate Class Actions to Assure Fairer Outcomes for Class Members and Defendants, and for Other Purposes*

- Introduced by: Grassley
- Date Introduced: 11/19/04
- Status: Read twice and referred to the Senate Committee on the Judiciary (11/19/04).
- Related Bills: S. 274, S. 1751, S. 1769, S. 2062, H.R. 1115
- Key Provisions:

— See S. 2062.

● S. 151 - *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*

- Introduced by: Hatch
- Date Introduced: 1/13/03
- Status: Read twice and referred to the Senate Committee on the Judiciary (1/13/03). Senate Judiciary Committee reported favorably with amendments (1/30/03). Report No. 108-2 filed (2/11/03). Passed Senate by a vote of 84-0 (2/24/03). Referred to House Judiciary Committee (2/25/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03). House inserted own version of bill. Chairman Sensenbrenner requested conference (3/27/03). Conferees appointed (3/27/03, 3/31/03, 4/3/03). Conference report 108-66 filed (4/9/03). House agreed to conference report by a vote of 400-25 (4/10/03). Senate agreed to conference report by a vote of 98-0 (4/10/03). Signed by President (4/30/03) (Pub. L. 108-21).
- Related Bills: S. 885, H.R. 1046
- Key Provisions:

— Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

● S. 274 - *Class Action Fairness Act of 2003*

- Introduced by: Grassley
- Date Introduced: 2/4/03

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

• Status: Read twice and referred to the Senate Committee on the Judiciary (2/4/03). Judiciary Committee approved the bill with two amendments by a vote of 12-7 and ordered it reported out of committee (4/11/03). Placed on Senate Legislative Calendar (6/2/03). Report No. 108-123 filed (7/31/03). Senate Amendment 2232 (1/20/04).
• Related Bills: S. 12, S. 1751, S. 1769, S. 2062, H.R. 1115
• Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. The above provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.

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

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

[As amended, only class actions involving at least $5 million would be eligible for federal court. Further, in class actions where more than two-thirds of the plaintiffs are from the same state. the case would remain in state court

automatically. In class actions where between one-third and two-thirds of the plaintiffs are from the same state as the defendant, the court has the discretion to accept removal or remand the case back to state court based on five specified factors. The second amendment deleted language from Section 4 that classified "private attorney general" as class actions.]

[Senate Amendment 2232 made numerous amendments to S. 274, including a provision that allows an appellate court to accept an appeal from an order granting or denying a motion to remand if the motion is made within 7 days after entry of order. If the appellate court accepts an appeal, the court must complete review within 60 days after the appeal was filed, unless an extension of time is granted.]

- S. 413 - *Asbestos Claims Criteria and Compensation Act of 2003*
  - Introduced by: Nickles
  - Date Introduced: 2/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/03).
  - Related Bills: H.R. 1586
  - Key Provisions:

    — Section 4 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing that he or she suffers from a medical condition to which exposure to asbestos was a substantial contributing factor.

    — Section 5 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

    — Section 5 also provides that a plaintiff may file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

    — Section 5 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 5. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- S. 554 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley
  - Date Introduced: 3/6/03
  - Status: Referred to the Senate Judiciary Committee (3/6/03). Senate Judiciary Committee reported bill without amendment favorably (5/22/03).
  - Related Bills: None
  - Key Provisions:

— Section 2 states that the presiding judge of an appellate or district court has the discretionary authority to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides.
— Section 2 also directs the presiding district court judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony.
— Section 2 specifies that the Judicial Conference may promulgate advisory guidelines on the management and administration of media access to court proceedings.
— Section 3 contains a "sunset" provision that terminates the authority of district court judges to allow media access three years after the date the Act is enacted.

- S. 578 - *Tribal Government Amendments to the Homeland Security Act of 2002*
  - Introduced by: Inouye
  - Date Introduced: 3/7/03
  - Status: Referred to the Senate Committee on Governmental Affairs (3/7/03). Senate Indian Affairs Committee held hearing (7/30/03).
  - Related Bills: H.R. 2242
  - Key Provisions:
    — Section 12 amends, inter alia, **Criminal Rule 6(e)(3)(C)** by replacing "federal, state . . . " with "Federal, State, tribal . . .."

- S. 644 - *Comprehensive Child Protection Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 3/18/03
  - Status: Referred to the Senate Judiciary Committee (3/18/03).
  - Related Bills: None
  - Key Provisions:
    — Section 6 amends **Evidence Rule 414(a).** The amendment would allow the admission of evidence, in a child molestation case, that the defendant had committed the offense of possessing sexually explicit materials involving a minor. Section 6 also amends the definition of a "child" to include those persons below the age of 18 (instead of the current age of 14).
    — Section 7 amends **28 U.S.C. chapter 119** by adding a new section 1826A that would make the marital communication privilege and the adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against (a) a child of either spouse, or (b) a child under the custody or control of either spouse.

- S. 805 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Leahy
  - Date Introduced: 4/7/03

- Status: Read twice and referred to the Senate Judiciary Committee (4/7/03).
- Related Bills: None
- Key Provisions:

  — Section 103 amends **Criminal Rule 11** by inserting a new subdivision that requires the court, before entering judgment following a guilty plea from the defendant, to ask whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. Section 103 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims the opportunity to be heard on whether the court should accept the defendant's guilty or no contest plea.

  — Section 105 amends **Criminal Rule 32 of the Federal Rules of Criminal Procedure** by affording victims an "enhanced" opportunity to be heard at sentencing. Section 105 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims enhanced opportunities to participate "during the pre-sentencing and sentencing phase of the criminal process."

- S. 817 - *Sunshine in Litigation Act of 2003*
  - Introduced by: Kohl
  - Date Introduced: 4/8/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/8/03).
  - Related Bills: None
  - Key Provisions:

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

    — Section 3 provides that the amendments shall take effect (1) 30 days after the date of enactment, and (2) apply only to orders entered in civil actions or agreements entered into after the effective date.

- S. 885 - *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*
  - Introduced by: Kennedy
  - Date Introduced: 4/10/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/10/03).
  - Related Bills: S. 151
  - Key Provisions:

    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an

unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 1023 - *To increase the annual salaries of justices and judges of the United States*
  - Introduced by: Hatch
  - Date Introduced: 5/7/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/7/03). Ordered to be reported with amendments favorably (5/22/03). Placed on Senate Legislative Calendar (6/18/03).
  - Related Bills: S. 554
    — Section 3 authorizes the presiding judge of an appellate or district court to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides. Section 3 also directs the presiding district judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony. Section 3 provides that the Judicial Conference may promulgate advisory guidelines on the management and administration of the above photographing, televising, broadcasting, or recording of court proceedings. The authority of a district judge under this act shall terminate 3 years after the date of enactment of the act.

- S. 1125 - *Fairness in Asbestos Injury Resolution Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 5/22/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/22/03). Senate Judiciary Committee held hearing (6/4/03). Markup session held (6/19/03, 6/24/03, 6/26/03). Senate Judiciary Committee reported favorably with amendments (7/10/03). Report No. 108-118 filed (7/30/03). Placed on Senate Calendar (7/30/03).
  - Related Bills: S. 2290
  - Key Provisions:
    — Section 101 amends **Part I of title 28, U.S.C.**, to create a new five-judge Article I court called the United States Court of Asbestos Claims. The Act also sets forth procedures governing: filing of claims, medical criteria, awards, funding allocation, and judicial review.
    — Section 402 states the Act's effect on bankruptcy laws.
    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also makes clear that the Act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

- S. 1700 - *Advancing Justice Through DNA Technology Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 10/1/03

- Status: Read twice and referred to the Senate Committee on the Judiciary (10/1/03). Senate Judiciary Committee held markup session (7/22/04). Senate Judiciary Committee held hearing (9/9/04). Senate Judiciary Committee reported the bill favorably—with one amendment in the nature of a substitute—by a vote of 11-7 (9/21/04).
- Related Bills: H.R. 3214
- Key Provisions:

  — Section 311 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 228A regarding post-conviction DNA testing. Under new section 3600(g)(1), the statute would provide that an inmate whose DNA test results excludes him or her "as the source of the DNA evidence," may file a motion for new trial or resentencing notwithstanding any rule or law that would bar such a motion as untimely.

- S. 1701 - *Reasonable Notice and Search Act*
  - Introduced by: Feingold
  - Date Introduced: 10/2/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/2/03).
  - Related Bills: S. 1709
  - Key Provisions:

    —Section 2 of the bill amends, inter alia, **18 U.S.C. section 3103a(b)** by setting a specific time limit in which the government may delay giving notice that a search warrant has been issued. Under section 2, the giving of such notice may be delayed by no more than 7 calendar days. This 7-day period may be extended for additional periods of up to 7 calendar days if a court finds on each application: (1) reasonable cause to believe that notice of the execution of the warrant will endanger the life or physical safety of an individual, (2) result in flight from prosecution, or (3) result in the destruction or tampering of evidence sought under the warrant. [Presently, the statute allows the government to delay giving notice for an unspecified period if the search warrant states that notice will be given "within a reasonable period of its execution."]

    —Section 2 also provides that Attorney General shall report to the Congress semiannually (a) all requests for delays of notice, and (b) all requests for extensions of notice under section 3103a(b).

    —Section 3 states that the provisions of this act shall sunset on December 31, 2005.

- S. 1709 - *Security Freedom Ensured Act of 2003 or the SAFE Act*
  - Introduced by: Craig
  - Date Introduced: 10/2/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/2/03).
  - Related Bills: S. 1701
  - Key Provisions:

    —Section 3 of the bill amends, inter alia, **18 U.S.C. section 3103a(b)** by setting a specific time limit in which the government may delay giving notice that a search

warrant has been issued. Under section 3, the giving of such notice may be delayed by no more than 7 days after execution of the warrant. This 7-day period may be extended for additional periods of up to 7 days if a court finds on each application: (1) reasonable cause to believe that notice of the execution of the warrant will endanger the life or physical safety of an individual, (2) result in flight from prosecution, or (3) result in the destruction or tampering of evidence sought under the warrant. [Presently, the statute allows the government to delay giving notice for an unspecified period if the search warrant states that notice will be given "within a reasonable period of its execution."]

—Section 3 also provides that Attorney General shall report to the Congress semiannually (a) all requests for delays of notice, and (b) all requests for extensions of notice under section 3103a(b).

—Section 3 states that the provisions of this act shall sunset on December 31, 2005.

- S. 1751 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced: 10/17/03
  - Status: Read twice and placed on Senate Legislative Calendar (10/17/03). Motions to proceed to consideration (10/17/03 and 10/20/03). Cloture motion presented in Senate (10/20/03). Cloture on the motion to proceed not invoked by a vote of 59-39 (10/22/03).
  - Related Bills: S. 12, S. 274, S. 1769, S. 2062, H.R. 1115
  - Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

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

A district court may decline to exercise jurisdiction as provided above in a class action case where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of

national or interstate interest, (b) whether the claims asserted will be governed by laws other than those of the state where the action was originally filed, (c) in the case of a state class action, whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed.
— Section 4 also contains a provision governing mass tort cases ("For purposes of this section and section 1453 of this title, a mass action shall be deemed to be a class action." This language is not included in the related bill, S. 274.)

A district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.
— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.
— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

- S. 1769 - *National Class Action Act of 2003*
  - Introduced by: Breaux
  - Date Introduced: 10/21/03
  - Status: Read twice and referred to the Committee on the Judiciary (10/21/03).
  - Related Bills: S. 12, S. 274, S. 1751, S. 2062, H.R. 1115
  - Key Provisions:

    — Section 2 amends **Part V of title 28, U.S.C.**, to include a new chapter on the review and approval of proposed coupon settlements in class action cases.
    — Section 3 amends **Chapter 85 of title 28, U.S.C.**, to add a new provision titled "National class actions." Under the new provision, (1) a district court shall have jurisdiction over a class action in which 1/3 or fewer of the plaintiff class are citizens of the state where the action was originally filed; (2) a district court may decline to exercise jurisdiction over a class action in which greater than 1/3 but

less than 2/3 of the plaintiff class are citizens of the state where the action was originally filed. In making its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of state or local interest, (b) whether the claims asserted will be governed by the laws other than those of the state where the action was originally filed, (c) whether the forum was chosen in bad faith or frivolously, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether the state claims asserted by class members of the state in which the action was filed would be preempted by a federal class action; (3) a district court may not exercise jurisdiction over a class action where (a) 2/3 or more of the plaintiff class are citizens of the state where the action was originally filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100; and (4) the new provision does not apply to any class action that involves only claims (a) concerning a covered security, (b) that relates to the internal affairs or governance of a corporation or other business enterprise, or (c) that relates to the rights, duties, and obligations relating to or created by any security.

- S. 1795 - *Bail Bond Fairness Act of 2003*
  - Introduced by: Graham
  - Date Introduced: 10/29/03
  - Status: Referred to the Senate Committee on the Judiciary (10/29/03).
  - Related Bills: H.R. 2134
  - Key Provisions:

    — Section 3 amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- S. 2062 - *Class Action Fairness Act of 2004*
  - Introduced by: Grassley
  - Date Introduced: 2/10/04
  - Status: Introduced, read and placed on Senate Legislative Calendar (2/10/04). Read a second time and placed on legislative calendar (2/11/04). Cloture motion (5/21/04). Cloture motion withdrawn by unanimous consent (6/1/04). Cloture motion (7/7/04). Senate Amendments 3548-3551 considered by the Senate (7/8/04). Cloture not invoked by a vote of 44 - 43 (7/8/04).
  - Related Bills: S. 12, S. 274, S. 1751, S. 1769, H.R. 1115
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on

Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), and notification of proposed settlement to appropriate state and federal officials. (Unlike S. 1751, there is no plain English requirement.)

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. A district court may decline to exercise jurisdiction as provided above in a class action case where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the class action was brought in a forum with sufficient nexus with the plaintiff class members, (e) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (f) whether, during the three-year period preceding the filing of the class action, one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

— Section 4 also contains a provision governing mass tort cases ("For purposes of this section and section 1453 of this title, a mass action shall be deemed to be a class action." This language is not included in the related bill, S. 274.) The section further provides that any action removed pursuant to the subsection shall not thereafter be transferred to any other court pursuant to 28 U.S.C. § 1407, unless a majority of the plaintiffs request the transfer.

In addition, like the predecessor legislation, a district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100. S.2062 adds additional grounds for

excluding class actions from federal jurisdiction: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

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

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

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

- S. 2290 - *Fairness in Asbestos Injury Resolution Act of 2004*
  - Introduced by: Hatch
  - Date Introduced: 4/7/04
  - Status: Introduced in the Senate (4/7/04). Read second time and placed on Senate Calendar (4/8/04). Petition to invoke cloture failed by a vote of 50 - 47 (4/22/04).
  - Related Bills: S. 1125
  - Key Provisions:

— Section 101 establishes within the Department of Labor the Office of Asbestos Disease Compensation. The office is charged with processing claims for compensation for asbestos-related injuries and paying compensation to eligible claimants under criteria and procedures established under the act. Under section 112, a claimant is not required to prove that his or her asbestos-related injury was caused by the negligence or fault of another person or entity.

— Section 221 establishes the Asbestos Injury Claims Resolution Fund, which shall be used to pay allowable asbestos-related claims.
— Section 301 states that the Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any action to review rules or regulations promulgated by the office administrator or the Asbestos Insurers Commission.
— Section 403 provides that the act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the act. Section 403 also makes clear that the act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

● S. 2329 - *Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*

• Introduced by: Kyl
• Date Introduced: 4/21/04
• Status: Introduced in the Senate and read twice (4/21/04). Considered and passed by the Senate with an amendment by a vote of 96-1 (4/22/04). Received in the House and referred to the House Judiciary Committee (4/26/04). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (6/28/04).
• Related Bills: S.J. Res. 1, H.J. Res. 10, H.J. Res. 48
• Key Provisions:
— Section 2 amends **Title 18 of the United States Code** by adding a new chapter on the rights of crime victims. The bill provides that a crime victim (defined as a person directly and proximately harmed as a result of the commission of a federal offense) has a number of rights such as the right to be protected from the accused, the right to reasonable notice of any public proceeding involving the crime or release/escape of the accused, and the right to be heard at any public proceeding involving release, plea, or sentencing. Section 2 also sets forth enforcement measures available to the crime victims.
— Section 4 directs the Administrative Office to report to Congress the number of times that a crime victim was denied rights under the legislation, and the reason for such denial.

● S. 2599 - *Information Sharing Improvement Act of 2004*

• Introduced by: Chambliss
• Date Introduced: 6/24/04
• Status: Read twice and referred to the Senate Judiciary Committee (6/24/04).
• Related Bills: None
• Key Provisions:
— Section 3 amends **Criminal Rule 6** to authorize sharing of grand jury information involving a threat of actual or potential terrorist attack among appropriate federal, state, state subdivision, Indian tribal, or foreign government official.

● S. 2679 - *Tools to Fight Terrorism Act of 2004*

- Introduced by: Kyl
- Date Introduced: 6/24/04
- Status: Read twice and placed on the Senate Legislative Calendar (7/19/04).
- Related Bills: None
- Key Provisions:

— Section 113 amends **Criminal Rule 6** to authorize sharing of grand jury information involving a threat of actual or potential terrorist attack among appropriate federal, state, state subdivision, Indian tribal, or foreign government official.

- S. 2827 - *Patients' Privacy Protection Act of 2004*
  - Introduced by: Clinton
  - Date Introduced: 9/22/04
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/22/04).
  - Related Bills: H.R. 5126
  - Key Provisions:

— Section 2 amends Article V of the Federal Rules of Evidence by creating a privilege between health care provider and patient concerning confidential communications made in the course of medical treatment.

- S. 2845 - *National Intelligence Reform Act of 2004*
  - Introduced by: Collins
  - Date Introduced: 9/23/04
  - Status: Passed Senate by a vote of 96-2 (10/6/04). Passed House (10/16/04).
  - Related Bills: H. Res. 827, H.R. 10, H.R. 5150, S. 2840
  - Key Provisions:

— Section 2191 amends **Criminal Rule 6** to authorize sharing of grand jury information involving a threat of actual or potential terrorist attack to appropriate federal, state, state subdivision, Indian tribal, or foreign government official. Any state, state subdivision, Indian tribal, or foreign government official who receives such information may use it only in accord with guidelines issued by the Attorney General and the National Intelligence Director.

HOUSE BILLS

- H.R. 538 - *Parent-Child Privilege Act of 2003*
  - Introduced by: Andrews
  - Date Introduced: 2/5/03
  - Status: Referred to the House Committee on the Judiciary (2/5/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003).
  - Related Bills: None
  - Key Provisions:

— Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a

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

- H.R. 637 - *Social Security Number Misuse Prevention Act*
  - Introduced by: Sweeney
  - Date Introduced: 2/5/03
  - Status: Referred to the House Committees on the Judiciary and Ways and Means (2/5/03). Referred to the House Ways and Means' Subcommittee on Social Security (2/19/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03).
  - Related Bills: None
  - Key Provisions:
    — Section 3 amends **chapter 47 of title 18, U.S.C.**, to prohibit the sale, public display, or purchase of a person's social security number without that person's affirmatively expressed consent.
    — Section 4 states that the above prohibition does not apply to a "public record." Section 4 defines "public record" to mean "any governmental record that is made available to the public." (One exception to section 4 is public records posted on the Internet: "Section 1028A shall apply to any public record first posted onto the Internet or provided in an electronic medium by, or on behalf of a government entity after the date of enactment of this section, except as limited by the Attorney General[.]")
    — Section 4 also provides that the Comptroller of the United States, in consultation with the Administrative Office of the U.S. Courts, shall conduct a study and prepare a report on the use of social security numbers in public records.

- H.R. 700 - *Openness in Justice Act*
  - Introduced by: Paul
  - Date Introduced: 2/11/03
  - Status: Referred to the House Committee on the Judiciary (2/11/03). Referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property (3/6/03).
  - Related Bills: None
  - Key Provisions:
    — Section 2 inserts a new Rule 49 in the Federal Rules of Appellate Procedure. Proposed Rule 49(a) would require the courts to issue a written opinion in the following cases: (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds $100,000, and (3) any appeal involving the use of the court's inherent powers. In addition, any party on direct appeal may request a written opinion under proposed Rule 49(b).

- H.R. 781 - *Privacy Protection Clarification Act*
  - Introduced by: Biggert
  - Date Introduced: 2/13/03
  - Status: Referred to the House Committee on Financial Services (2/13/03). Referred to the House Financial Services' Subcommittee on Financial Institutions and Consumer Credit (3/10/03).
  - Related Bills: None
  - Key Provisions:
    — Section 2 amends the Gramm-Leach-Bliley Financial Modernization Act (Pub. L. No. 106-102) to exempt attorneys from the privacy provisions of the Act. Specifically, section 2 defines "financial institution" to exclude attorneys who are subject to, and are in compliance with, client-confidentiality provisions under their state, district, or territory's professional code of conduct.

- H.R. 975 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/27/03
  - Status: Referred to the House Committees on the Judiciary and Financial Services (2/27/03). Referred to the House Judiciary Committee Subcommittee on Commercial and Administrative Law (2/28/03). Subcommittee hearings held (3/4/03). Subcommittee discharged (3/7/03). Committee consideration and mark-up session held. Committee ordered bill to be reported by a vote of 18-11 (3/12/03). House Report 108-40 filed (3/18/03). Passed the House with several amendments by a vote of 315-113 (3/19/03). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (3/20/03). Read the second time and placed on Senate Legislative Calendar (3/21/03).
  - Related Bills: None
  - Key Provisions:
    — Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.
    — Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.
    — Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.
    — Section 419 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require

Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

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

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

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

— Section 601 amends **chapter 6 of 28 U.S.C.,** to direct: (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to make such statistics available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than June 1, 2005.

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

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

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

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

[On January 28, 2004, the House voted 265-99 to append the language of H.R. 975 to S. 1920 (a bill "to extend for 6 months the period for which Chapter 12 of

title 11 of the United States Code is reenacted").]

- H.R. 1115 - *Class Action Fairness Act of 2003*
  - Introduced by: Goodlatte
  - Date Introduced: 3/6/03
  - Status: Referred to the House Committee on the Judiciary (3/6/03). House Judiciary Committee held hearing (5/15/03). House Judiciary Committee held markup and ordered bill reported, with two amendments, favorably by a vote of 20-14 (5/21/03). House Report No. 108-144 filed (6/9/03). H. Amdt. 167 approved (6/12/03). Passed the House by a vote of 253-170 (6/12/03). Received in Senate and referred to Judiciary Committee (6/12/03).
  - Related Bills: S. 12, S. 274, S. 1751, S. 1769, S. 2062
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location), and the publication of settlement information in plain English.

    — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. These provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.

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

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

    [As amended on May 21, 2003, the first amendment accelerates the Civil Rule 23 amendments that were approved by the Supreme Court on March 27, 2003, to the date of enactment or December 1, 2003, whichever is earlier. The second amendment revised the effective date of the legislation. The legislation will apply

to all pending cases in which the class certification decision has not yet been made.]

[House Amdt. 167 raises the aggregate amount in controversy required for federal court jurisdiction from $2 million to $5 million. The amendment also gives federal courts discretion to return intrastate class actions to state courts after weighing five factors to determine if the case is of a local character. This discretion would come into play when between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants. If more than two-thirds are citizens of the same state, the case would remain in state court.]

● H.R. 1303 - *To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.*

• Introduced by: Smith

• Date Introduced: 3/18/03

• Status: Referred to the House Committee on the Judiciary (3/18/03). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/19/03). Subcommittee held mark-up session and subsequently voted to forward the bill to the full committee (3/20/03). House Judiciary Committee held mark-up session, approved amendments, and ordered to be reported (7/16/03). House Report 108-239 filed (7/25/03). House passed by voice vote (10/7/03). Received in the Senate, read twice, and referred to the Committee on Governmental Affairs (10/14/03). Committee on Governmental Affairs reported favorably without amendment (6/2/04). Committee on Governmental Affairs reported favorably without amendment and placed on Senate Legislative Calendar (7/7/04). Senate passed without amendment (7/15/04). Presented to the President (7/22/04). Signed by President (8/2/04) (Pub. L. 108-281).

• Related Bills: None

• Key Provisions:

— As amended, Section 1 amends Section 205(c) of the E-Government Act of 2002 (Pub. L. 107-347) by requiring the Judicial Conference to promulgate rules that protect privacy and security interests pertaining to the electronic filing and public availability of documents filed electronically or converted to electronic form. (Section 1 directs that the rules take into account the best practices in state and federal courts.)

— Section 1 also amends the E-Government Act of 2002 by allowing a party to file an unredacted document under seal that will be part of the court record. In the court's discretion, this unredacted document will either be in lieu of, or in addition to, a redacted copy in the public file.

— Section 1 further provides that the rules may permit the filing of a list, filed under seal, that references each item of unredacted protected information. The rules may also provide that all references to the redacted identifiers in the reference list be construed to refer to the corresponding unredacted item of protected information.

- H.R. 1586 - *Asbestos Compensation Fairness Act of 2003*
  - Introduced by: Cannon
  - Date Introduced: 4/3/03
  - Status: Referred to the House Committee on the Judiciary (4/3/03).
  - Related Bills: S. 413
  - Key Provisions:

    — Section 3 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing of physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor.

    — Section 4 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

    — Section 4 also provides that a plaintiff must file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

    — Section 4 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 4. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- H.R. 1768 - *Multidistrict Litigation Restoration Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 4/11/03
  - Status: Referred to the House Committee on the Judiciary (4/11/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003). Subcommittee held mark-up session and forwarded to full committee (7/22/03). Committee held markup session and ordered bill reported by voice vote (1/28/04). House Report No. 108-416 filed (2/10/04). House passed bill by a vote of 418-0 (March 24, 2004). Received in the Senate and referred to the Senate Judiciary Committee (3/25/04).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory and punitive damages.

- H.R. 2134 - *Bail Bond Fairness Act of 2003*
  - Introduced by: Keller
  - Date Introduced: 5/15/03

• Status: Referred to the House Committee on the Judiciary (5/15/03). Referred to the Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03). House Judiciary Committee favorably reported by acclamation (9/10/03) (Committee also voted to delete finding 5 in Section 2(a)(5) by a voice vote. That finding iterated that "[i]n the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances every year"). Reported by the House Judiciary Committee H. Rept. 108-316 (10/15/03). Placed on Union Calendar (10/15/03).
• Related Bills: None.
• Key Provisions:

— Section 3 ostensibly amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- H.R. 2242 - *Tribal Government Amendments to the Homeland Security Act*
  • Introduced by: Kennedy
  • Date Introduced: 5/22/03
  • Status: Referred to the House Committees on Resources, Judiciary, Budget, Intelligence, Homeland Security (5/22/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03).
  • Related Bills: S.578
  • Key Provisions:

  — Section 12 amends, inter alia, **Criminal Rule 6(e)(3)(C)** by replacing "federal, state . . . " with "Federal, State, tribal . . .."

- H.R. 3037 - *Antiterrorism Tools Enhancement Act of 2003*
  • Introduced by: Feeney
  • Date Introduced: 9/9/03
  • Status: Referred to the House Committee on the Judiciary (9/9/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (10/22/03).
  • Related Bills: None.
  • Key Provisions:

  — Section 2 amends **Criminal Rule 41(b)(3)** by providing that a magistrate judge in a district where an act of terrorism has occurred may issue a warrant for a person or property within or without that district.

- H.R. 3214 - *Advancing Justice Through DNA Technology Act of 2003*
  • Introduced by: Sensenbrenner
  • Date Introduced: 10/1/03
  • Status: Referred to the House Committees on the Judiciary and Armed Services (10/1/03). Referred to the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (10/2/03). Subcommittee on Crime, Terrorism, and Homeland

Security discharged (10/6/03). Judiciary Committee held mark-up session and ordered reported by a vote of 28-1 (10/8/03). House Report 108-321 filed (10/16/03). House Committee on Armed Services discharged (10/16/03). Placed on Union Calendar (10/16/03). House voted to suspend the rules and pass bill by a vote of 357-67 (11/5/03). Received in the Senate (11/6/03). Read twice and referred to the Senate Judiciary Committee (12/9/03).

- Related Bills: S. 1700.
- Key Provisions:

— Section 311 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 228A regarding post-conviction DNA testing. Under new section 3600(g)(1), the statute would provide that an inmate whose DNA test results excludes him or her "as the source of the DNA evidence," may file a motion for new trial or resentencing notwithstanding any rule or law that would bar such a motion as untimely.

- H.R. 3381 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Norton
  - Date Introduced: 10/28/03
  - Status: Referred to the House Committees on the Judiciary, Budget, and Rules (10/28/03). Referred to the Committee's Subcommittee on Crime, Terrorism, and Homeland Security (12/10/03).
  - Related Bills: S.J. Res. 1, H.J. Res. 10, H.J. Res. 48.
  - Key Provisions:

— Section 103 amends **Criminal Rule 11** by adding a new subdivision that provides that the court should not enter judgment on a defendant's guilty plea before asking the prosecutor whether the victim (or any other person whose safety, by relationship to the victim, may be reasonably threatened) has been consulted on the defendant's plea. Section 103 also directs the Judicial Conference to report to the Congress, within 180 days after enactment of the act, recommending amendments to the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims and others to be heard on whether or not the court should accept a guilty or nolo contendere plea from the defendant.

— Section 105 amends **Criminal Rule 32** by eliminating the restriction that only victims of violent crimes or sexual abuse at sentencing may be heard at sentencing. Section 105 also directs the Judicial Conference to report to the Congress, within 180 days after enactment of the act, recommending amendments to the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims to participate during the presentencing and sentencing phases.

- H.R. 4342 - *Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*
  - Introduced by: Chabot
  - Date Introduced: 5/12/04
  - Status: Referred to the House Judiciary Committee (5/12/04). Referred to the

Subcommittee on Crime, Terrorism, and Homeland Security (6/28/04).
• Related Bills: S. 2329, S.J. Res. 1, H.J. Res. 10, H.J. Res. 48
• Key Provisions:
— Section 2 amends **Title 18 of the United States Code** by adding a new chapter on the rights of crime victims. The bill provides that a crime victim (defined as a person directly and proximately harmed as a result of the commission of a federal offense) has a number of rights such as the right to be protected from the accused, the right to reasonable notice of any public proceeding involving the crime or release/escape of the accused, and the right to be heard at any public proceeding involving release, plea, or sentencing. Section 2 also sets forth enforcement measures available to the crime victims.
— Section 4 directs the Administrative Office to report to Congress the number of times that a crime victim was denied rights under the legislation, and the reason for such denial.

● H.R. 4547 - *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004*
• Introduced by: Sensenbrenner
• Date Introduced: 6/14/04
• Status: Referred to the House Judiciary Committee and House Energy and Commerce Committee (6/14/04). Referred to House Energy and Commerce Committee's Subcommittee on Health (6/18/04). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (6/28/04). Subcommittee on Crime, Terrorism, and Homeland Security held hearing (7/6/04). Subcommittee on Crime, Terrorism, and Homeland Security held markup session and forwarded amended bill to House Judiciary Committee (9/23/04).
• Related Bills: None
• Key Provisions:
— Section 9 amends **Criminal Rule 11** by setting forth new procedures for accepting, rejecting, or deferring a plea agreement. The legislation would amend Rule 11 to impose conditions on a court before it could accept a plea agreement. The conditions were to ensure that the plea agreement is consistent with the Federal Sentencing Guidelines. [Section 9 was subsequently deleted from the bill during markup by the Subcommittee on Crime, Terrorism, and Homeland Security on September 23, 2004.]

● H.R. 4571 - *Lawsuit Abuse Reduction Act of 2004*
• Introduced by: Smith
• Date Introduced: 6/15/04
• Status: Referred to the House Judiciary Committee (6/15/04). House Judiciary Committee held an oversight hearing titled, "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse" (6/22/04). Referred to the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property (6/28/04). Judiciary Committee held mark-up and ordered measure reported by a vote of 18-10 (9/8/04). House Report 108-682 filed (9/13/04). House passed bill by vote of 229-174 (9/14/04). Received in Senate, read twice, and referred to Senate

Committee on the Judiciary (9/15/04).

• Related Bills: None
• Key Provisions:
— Section 2 amends **Civil Rule 11** by requiring the court to impose an appropriate sanction upon attorneys, law firms, or parties who violate provisions of the rule.
— Section 3 would make amend Rule 11 applicable to state cases affecting interstate commerce.
— Section 4 generally provides that a personal injury claim filed either in state or federal court may be filed only in the state or federal district where (1) the person bringing the claim (a) resides at the time of filing, or (b) resided at the time of the alleged injury; (2) the alleged injury or circumstances giving rise to the personal injury claim occurred; or (3) the defendant's principal place of business is located.
— Section 6 provides that a federal court must suspend an attorney from the practice of law in the district if the attorney has violated Rule 11 three or more times.
— Section 7 would sanction any person who willfully and intentionally "influences, obstructs, or impedes, or attempts to influence, obstruct, or impede" a pending court proceeding through the willful and intentional destruction of documents sought in and highly relevant to that proceeding.

● H.R. 5107 - *Justice for All Act of 2004*
• Introduced by: Sensenbrenner
• Date Introduced: 9/21/04
• Status: Referred to the House Committee on the Judiciary (9/21/04). Committee held markup session and ordered bill reported (9/22/04). House Report 108-711 filed (9/30/04). House Amendment 781 agreed to by voice vote (10/6/04). House passed bill by vote of 393-14 (10/6/04). Received in Senate and read twice (10/7/04). Passed Senate without amendment by unanimous consent (10/9/04). Signed by the President - Pub. L.108-405 (10/30/04)
• Related Bills: S. 1700, HR 3214.
• Key Provisions:
— Section 102 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 237 on the rights of crime victims, including the right to be heard at any public proceeding involving release, plea, or sentencing. There is also a mechanism that gives victims the right to move to enforce these rights in district court. If the district court denies the relief sought, then the victims may petition the court of appeals for a writ of mandamus. The court of appeals must decide the petition within 72 hours after the petition has been filed.

[— House Amdt 781 allows a crime victim to bring a motion to enforce the right to be heard in a proceeding involving release, plea, sentencing, or parole hearing. If the court denies the relief sought, the victim may file a petition for mandamus with the court of appeals. A single judge or the court pursuant to the FRAP may issue the writ. The court of appeals shall take up and decide the application for writ of mandamus within 72 hours after it is filed. No continuance shall be longer than 5 days.]

● H.R. 5126 - *Patients' Privacy Protection Act of 2004*

- Introduced by: Nadler
- Date Introduced: 9/22/04
- Status: Referred to the House Committee on the Judiciary (9/22/04). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (11/5/04).
- Related Bills: S. 2827
- Key Provisions:

— Section 2 amends Article V of the Federal Rules of Evidence by creating a privilege between health care provider and patient concerning confidential communications made in the course of medical treatment.

SENATE RESOLUTIONS

● S.J. Res. 1 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Kyl
- Date Introduced: 1/7/03.
- Status: Referred to the Senate Committee on the Judiciary (1/7/03). Judiciary Committee held hearing (4/8/03). Referred to House Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Property Rights (6/10/03). Subcommittee on Constitution approved without amendment by a vote of 5-4 (6/12/03). Markup sessions held (7/24/03 and 7/31/03). Senate Judiciary Committee reported favorably without amendment and written report (9/4/03). Placed on Senate Calendar (9/4/03). Report No. 108-191 filed (11/7/03). Cloture motion (4/20/04).
- Related Bills: H.J. Res. 10, H.J. Res. 48
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H.J. Res. 10 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Royce
- Date Introduced: 1/7/03.
- Status: Referred to the House Committee on the Judiciary (1/7/03). Referred to the

Subcommittee on the Constitution (3/6/04).

- Related Bills: S.J. Res. 1, H.J. Res. 48
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

● H.J. Res. 48 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Chabot
- Date Introduced: 4/10/03.
- Status: Referred to the House Committee on the Judiciary (4/10/03). Referred to the Subcommittee on the Constitution (5/5/2003). Subcommittee held hearing (9/30/03).
- Related Bills: S.J. Res. 1, H.J. Res. 10
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 15, 2004

MEMORANDUM TO THE STANDING COMMITTEE

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

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

Federal Rulemaking Web Site

We have posted on the Judiciary's Federal Rulemaking Internet web site <www.uscourts.gov/rules> all advisory rules committees' reports to the Standing Committee from 1992/3 to present. Together with rules committees' minutes dating back to 1992, we now have on the web site a core collection of rules records for the past 12 years. The collection allows users to research the "legislative history" of rules amendments considered by the rules committees during the past decade.

We are now exploring how we can convert into electronic form rules-related microfiche records from 1935-1991. We would like to add these key historical records to our document-management system and then post them on the web site when the funding situation improves.

We have also posted on the web site comments received on proposed Civil Rules amendments published for comment in August 2004 (see below). The web site continues to be well used, with a total of 13,350 "visits" during October 2004, an average of 460 visits per day.

Comments Received on Proposed Amendments

Last year, the office received, acknowledged, forwarded, and followed up on over 600 comments. In light of the substantial public interest in the proposed electronic discovery amendments published for comment in August 2004, we have posted the comments on the rules web site. This new procedure is intended to facilitate an interchange of ideas among the bench, bar, and public that may highlight and sharpen the key issues arising from the proposed rules amendments. We will continue to distribute the comments to the committee members electronically using Adobe PDF, with a follow-up mailing of a complete set of all comments received

Committee and Subcommittee Meetings

For the period from May 13 through December 15, 2004, the office staffed eight meetings, including one Standing Committee meeting, four advisory rules committee meetings, two subcommittee meetings, and a meeting of the Informal Working Group on Mass Torts. The office has also arranged and participated in numerous conference calls involving rules subcommittees.

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

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

Automation Project (Documentum)

Our web-based electronic document-management system (Documentum 5) continues to work very well. We are using Documentum to file, review, and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, expedite intake and processing of e-mails and attachments, and track different versions of documents to ensure the quality and accuracy of work products. We hope to add the following enhancements to the system: remote access to the database by committee members, reporters, and staff; improved search and retrieval capability; distributing agenda book copies in electronic form; and "redlining" software. Funding for the enhancements, however, continues to be an issue because of budget constraints.

Miscellaneous

In August 2004, we prepared and published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence*, seeking public comment on proposed amendments to Bankruptcy Rules 1009, 2002, 4002, 5005, 7004, 9001, 9036, and Schedule I of Official Form 6; Civil Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G, and revisions to Form 35; Criminal Rules 5, 32.1, 40, 41, and 58; and Evidence Rules 404, 408, 606, and 609. We sent the pamphlet to legal publishers and the court family and posted it on the rules web site.

In November 2004, we prepared and published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* seeking public comment—on an expedited schedule—on proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, and Civil Rule 5. The proposed amendments authorize courts to adopt local rules requiring electronic filing. We sent the pamphlet to legal publishers and the court family, and we posted it on the rules web site.

In November 2004, the courts were advised that the amendments to the Federal Rules of Bankruptcy and Criminal Procedure (including the Rules Governing Section 2254 Cases in the United States District Courts; Rules Governing Section 2255 Cases in the United States District Courts; and the official forms accompanying the section 2254 and section 2255 rules), approved by the Supreme Court on April 26, 2004, would take effect on December 1, 2004. The forms accompanying the § 2254 and § 2255 Rules have been comprehensively revised and modernized. The revisions conform to the Antiterrorism and Effective Death Penalty Act of 1996, apply best practices of the courts, and simplify the forms. The courts were also advised that they may wish to consider the practice of the United States District Court for the Eastern District of Virginia, which adopted the revised forms, effective December 1, 2004, and require their use in all § 2254 and § 2255 cases filed with the court.

In November 2004, we also delivered to the Supreme Court proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure that were approved by the Judicial Conference at its September 2004 session. We advised William K. Suter, Clerk of the Supreme Court, of the intent to transmit proposed amendments to Bankruptcy Rules 2002, 9001, and 9036 in March 2005. The proposed amendments, which are being considered on an expedited schedule, facilitate the transmission of notices to a centralized, agreed-upon electronic mailing address, and could save the courts considerable amounts of money in mailing and administrative expenses.

James N. Ishida

Attachments

CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

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

Suggestion	Docket Number, Source, and Date	Status
	CIVIL RULES	
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 5(b)(2)(D) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**
Rule 5(e) Mandatory electronic filing should be encouraged to the fullest extent possible	04-CV-G Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 6 Time Issues	03-CV-C Irwin H. Warren, Esquire 6/26/03	6/03 - Referred to reporter and chair 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for

Suggestion	Docket Number, Source, and Date	Status
		publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 6(e) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7.1(a) Simplify filing by creating a national event in the CM/ECF system for filing of supplemental statement	04-CV-I Lawrence K. Baerman, Clerk 11/29/04	12/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim@ that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(c) In restyling the civil rules: delete Adischarge in bankruptcy@; and insert Aclaim preclusion@ and Aissue preclusion@	04-CV-E Judge Christopher M. Klein 3/30/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new	Judge John Martin 10/20/94 &	4/95 - Committee considered 11/95 - Committee considered and deferred

Suggestion	Docket Number, Source, and Date	Status
parties or raise events occurring after responsive pleading	Judge Judith Guthrie 10/27/94	**DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 23 Revise to protect the status of the small defendant	03-CV-D William S. Karn 7/31/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee=s report 2/04 - Committee presented E-Discovery Conference at Fordham Law School in New York 4/04 - Committee considered and approved subcommittee's recommendation to publish for public comment 6/04 - Standing Committee approved for publication 8/04 - Published for public comment
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 30(b)/45 Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee 8/03 - Committee published proposed amendments to Civil Rule 45 re notifying witness of the manner of recording the deposition 4/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 30(b)(6) Myriad proposed amendments	04-CV-B New York State Bar Association Commercial and Federal Litigation Section (Gregory K. Arenson, Esq., Chair) 2/24/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K. Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 50(b) Eliminate the requirement that a motion for judgment be made Aat the close of all the evidence@ as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered 10/03 - Committee considered 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 54(b) Define Ainterlocutory order@	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing AIndicative Rulings@	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and ' 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. ' 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED**

Suggestion	Docket Number, Source, and Date	Status
		5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 68 Permit plaintiffs and defendants to make offers of compromise	04-CV-H Judge Christina A. Snyder 7/23/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(c) Removal of an action from state courts C technical conforming change deleting Apetition@	Joseph D. Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
	FORMS	

Suggestion	Docket Number, Source, and Date	Status
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, Athat the action be dismissed on the merits@ as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
SUBJECT MATTER		
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
New Admiralty Rule G Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice

Suggestion	Docket Number, Source, and Date	Status
		5/03 - Committee considered new Admiralty Rule G 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A. Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
***De Bene Esse* Depositions** Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Discovery Rules Return to them as they were before the 1993 amendments	04-CV-D Judge Wm. R. Wilson, Jr. 2/9/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Electronic Filing To require clerk=s office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for

Suggestion	Docket Number, Source, and Date	Status
		publication. Publication to be deferred. 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 4/04 - Committee approved for publication restyle Civil Rules 38-63 6/04 - Standing Committee approved for publication **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Require less than unanimous verdicts	04-CV-F Judge James T. Trimble, Jr. 4/1/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term Aaction@ for Acase@ and other similar words; substitute term Aaverment@ for Aallegation@ and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

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

Suggestion	Docket Number, Source, and Date	Status
	CRIMINAL RULES	
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
New Rule 59 To provide counterpart to Civil Rule 72	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved **PENDING FURTHER ACTION**
	SUBJECT MATTER	
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition*. *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)	03-CR-F Steven W. Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET

ADVISORY COMMITTEE ON EVIDENCE RULES

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

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

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey 11/03 - Committee considered survey 4/04 - Committee considered survey **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 609(a) Clarify types of crimes that qualify for mandatory admission under the rule		4/02 - Committee referred to reporter 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 803(8)(C) Amendment to the trustworthiness proviso of this rule	04-EV-A Center for Regulatory Effectiveness (William G. Kelly, Jr., General Counsel) 8/9/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
SUBJECT MATTER		
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**

Agenda Item 4
Committee on Rules of
Practice and Procedure
January 2005
Informational

FEDERAL JUDICIAL CENTER UPDATE

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

Appellate Research Projects

Analysis of Briefing Requirements in the U. S. Courts of Appeals. The Advisory Committee on Appellate Rules is considering a proposal to amend Federal Rule of Appellate Procedure 28(a), which governs the contents of an appellant's brief. The Committee undertook its examination of the rule after learning that many circuits have implemented, by local rule or otherwise, additional restrictions not specified in FRAP 28 and that some circuits are not accepting briefs that do not meet local requirements. Before making decisions regarding amendments to FRAP 28, the Committee decided to collect information about circuit practices and asked the Center to identify all circuit local rules or practices that impose requirements not found in Rule 28, as well as the history of each such local rule or practice and the extent to which the local rules or practices are enforced. We presented the results of our research at the Committee's December 2004 meeting.

Study of Citation of Unpublished Appellate Opinions in the U.S. Courts of Appeals. The Standing Committee on the Rules of Practice and Procedure has asked the Center to conduct a study of the possible impact of permitting citation of unpublished appellate opinions in briefs filed in the U.S. Courts of Appeals. The results of the study will be presented at the April 2005 meeting of the Appellate Rules Committee.

Bankruptcy Research Projects and Publications

Proceedings of Research Conference on Venue in Chapter 11 Cases. Recently, we posted on the Center's web site follow-up information from a small conference on Chapter 11 venue that we sponsored at the request of the Committee on the Administration of the Bankruptcy System.

Model Survey for Bankruptcy Judges. The Center has developed a model survey that bankruptcy judges can use to get attorney feedback about their performance at the time their reappointment is being considered. The survey has been shared with the Committee on the Administration of the Bankruptcy System. The Center will make the survey available to bankruptcy judges for their use.

Civil Research Projects and Publications

Discovery of Electronic Documents/Evidence. As the Discovery Subcommittee of the Civil Rules Advisory Committee considers possible amendments to FRCP Rules 16(b), 26(f)(3), 34(a), 37(f), and 45, the Center continues to monitor developments in the area of electronic discovery by maintaining and updating a web-based, password-accessible database of information and materials from more than 250 continuing legal education courses on electronic discovery (available at cwn.fjc.dcn). We also continue to assist federal judges who are making public presentations, writing articles, or teaching courses on various aspects of electronic discovery and evidence.

Research on the Disposition of Complaints Filed Under 28 U.S.C. § 351. The Center is providing assistance to the Judicial Conduct and Disability Act Study Committee, appointed by the Chief Justice and chaired by Justice Breyer. Pursuant to a research plan approved by the Committee, a research team comprising two senior Center researchers and a senior attorney in the Office of General Counsel of the Administrative Office is visiting each circuit headquarters to review a stratified sample of complaints disposed of in 2001-2003.

Criminal Research Projects and Publications

Treatment of *Brady v. Maryland* Material in U. S. District and State Court Rules, Orders, and Policies. The Center has completed a comprehensive study of federal district court and state court local rules and practices governing prosecutorial disclosure of information in criminal cases under *Brady v. Maryland*. The study was conducted for the Advisory Committee on Criminal Rules; the results were presented at the Committee's October 2004 meeting.

Case Weight Studies

District Court Case Weights Study. The Center's final report on the new district court case weights, which were developed for the Judicial Resources Committee, was presented at that Committee's December 2004 meeting. The report will be posted on the Center's web site.

Bankruptcy Court Case Weights Study. The Center continues to work closely with the Committee on the Administration of the Bankruptcy System to map out and conduct research to revise the current bankruptcy case weights. Over the next few months, we will be pre-testing the daily log forms that all bankruptcy judges will be asked to complete to report time spent on bankruptcy-related matters during the study. Unlike the district court time case weights study, the approach we are taking to update the bankruptcy case weights will entail five groups of judges who will report time spent on bankruptcy-related matters over the course of ten weeks. The reporting periods will begin on January 3, 2005 and will run consecutively through December 18, 2005.

Educational Programs and Publications for Chief Judges and Court Managers

CM/ECF for Appellate Courts. On September 29-30, the Center, in coordination with the AO, conducted a conference for judges and court staff from the Eighth Circuit Court of Appeals and from district courts in that circuit, along with selected attorneys in the circuit, to examine the implementation of CM/ECF in the Court of Appeals. The conference identified areas in which CM/ECF may contribute to the efficient operation of the court and also identified issues to be addressed to implement CM/ECF effectively. The Center is prepared to conduct similar programs for other appellate courts.

Shared Services. At the request of the District Court of Nebraska, the Center facilitated an examination of shared administrative services that resulted in creating a new structure for the district's clerk's, probation, and pretrial services offices. The Center is prepared to conduct similar programs for other districts.

Conference for Chief District Judges. A Conference for chief district judges will be held in Washington, DC, April 14-15, 2005.

Juror Management and Utilization Workshop for Small and Medium-Sized Courts. In November, district court teams of judges, clerks of court, and jury administrators met to discuss strategies, current issues, and future trends and to develop action plans to improve juror management and utilization. Because the response rate was so high—nineteen courts asked to attend—two workshops were held.

Biennial National Conference for Bankruptcy Court Clerks and Chief Deputy Clerks. Participants will meet in November 2005 to discuss legal perspectives on fiscal responsibilities, leadership challenges in times of uncertainty, and new technologies and management strategies that have been successfully implemented in some court units. The biennial national conference for district court clerks and chief deputy clerks was held in October 2004.

Technology Leadership Workshops. The Center will continue to offer a new program to help unit executives and information technology managers plan and monitor automation projects, make procurement decisions, and hire and manage a diverse and geographically separated workforce. The most recent workshop, for bankruptcy court teams, was held in October 2004.

Managing the Human Impact of Downsizing. A new video-audio-print package, titled *Managing the Human Impact of Downsizing*, is now available on request to court managers.

Individual Development Plans for Staff Development. A new curriculum package helps managers and staff develop customized education plans to ensure that each employee has the requisite skills to support the goals and objectives of the court unit. The next workshop to prepare court staff to deliver the program will be held in February 2005.

Leadership Institute for Chief Deputy Clerks and Deputy Chief Probation and Pretrial Services Officers. Due to the 100% oversubscription of the new March 2004 Leadership Institute, the Center will offer a second program in December 2004. Participants will discuss change management, maximizing human resources, and identifying personal leadership strengths and areas for development.

Multi-Year Leadership Development Programs. This fall, the Center will invite applications for Class VIII (2005-2008) of the Leadership Development Program for Probation and Pretrial Services Officers. The 64 members of Class V of the Federal Court Leadership Program are currently doing the in-district problem-solving projects that are part of their course requirements.

Educational Programs and Publications for Judges

National and Circuit-Based Workshops. In 2005, the Center will conduct circuit-based workshops for Article III judges, and national workshops for bankruptcy and magistrate judges. The three-day workshops will examine matters of current interest to each category of judge.

Seminars. In 2005, the Center will offer a variety of small-group seminars for judges. Topics include law and genetics, employment law, law and terrorism, intellectual property law, Section 1983 litigation, and mediation skills.

FJTN Programs

- In November 2004, the Center broadcast a program on habeas corpus in immigration cases.
- In February 2005, the Center will broadcast updates on bankruptcy cases in the Fourth and Eighth Circuits, respectively.
- In March 2005, the Center will broadcast a program on the application of the Hague Convention in child abduction cases.
- Following a decision in the *Booker* and *Fanfan* cases dealing with the U.S. Sentencing Guidelines, the Center will conduct one or more television programs to update judges on developments after these decisions.

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

Monographs. The Center recently published an update of its 1996 monograph on employment discrimination litigation and a new monograph on admiralty and maritime law. In development are new monographs on ERISA and environmental law and updates

of the 1991 Center monograph on copyright law and the 1994 monograph on awarding attorneys' fees and managing fee litigation.

Managing State Habeas Cases. We have completed our project to collect materials on management of state habeas cases. The materials discuss special considerations and issues in capital cases and describe systems or procedures courts have developed to deal with some of these issues. The materials are available in electronic form on the Center's intranet (cwn.fjc.dcn) and Internet (www.fjc.gov) web sites, as a companion resource to the Center's compilation and summary of procedures used in handling federal death penalty cases. Both will be revised as the courts' experiences warrant.

Educational Programs for Probation and Pretrial Services Officers

Workshops for New Officers. A five-day national orientation seminar for probation and pretrial services officers was conducted in November 2004.

Executive Team Development. A new program, executive team development for chief and deputy chief probation and pretrial services officers, will be offered in January 2005.

Additional FJTN Programs for Officers. A new series on Financial Investigations was introduced in July 2004. The first program focused on fundamental techniques of financial investigations. The second program, scheduled for December, will cover document analysis. A 90-minute web-phone conference will follow each program so participants can question the faculty and share techniques with colleagues. Other FJTN programs for officers include Domestic Violence Awareness, an FJC-National Institute of Corrections collaborative television program; a safety series on mental health issues; and a program on alcoholism as part of the substance abuse series.

Educational Programs for Court Staff Generally

Professional Education Initiative. In 2005, the Center will introduce a new professional educational plan for court staff in leadership and management positions. The plan, which includes separate tracks for staff in clerks and probation or pretrial services offices, is based on key competencies that managers and leaders need to excel. The competencies were developed in consultation with advisory committees of experienced court unit executives in each group. The Center's intranet site (cwn.fjc.dcn) will describe the educational plan, as well as programs and materials that teach the competencies. Several new programs will be introduced as part of the plan.

New Curriculum Packaged Programs. Center curriculum packaged programs include instructor and participant guides, overhead slides, and in some instances, video components. The programs are designed to be delivered by court staff who are trained by the Center or who have training experience. The following programs are scheduled for release this year: Customer Service in a CM/ECF Environment; probation or pretrial services-specific programs on writing skills, mock court testifying, structuring defendant and offender interviews, and organizing work. The

Government Printing Office will incorporate the Center's new Trust in the Workplace curriculum package into a GPO training program.

Book Reviews for Court Leaders. Several book reviews written by court and Center staff are now posted on the Center's web site on the judiciary's intranet (cwn.fjc.dcn); additional reviews will be posted throughout the year. An editorial board of court unit executives helps us select books that are relevant, though not always obviously applicable, to the federal courts

FJTN Programs on the Center's January to June Program Schedule. Programs developed for all court staff will include two new editions of the *Court to Court* television magazine and a video, *Justice Depends on You*, that describes the important role court employees play in the administration of justice.

Other Programs

On-Site Consultations in Dispute Resolution. In 2003, the Center announced its Program for Consultations in Dispute Resolution, which provides on-site consultations to district and bankruptcy courts seeking assistance with ADR programs. The consultations, which are supported by a grant from the Hewlett Foundation, are provided by judges and court staff who have substantial ADR expertise. We have received nineteen inquiries to date, have completed eleven consultations, and are planning several more. Judge Kessler serves as this Committee's liaison judge to the project and is also one of the twenty-four expert consultants.

Non-Prisoner Pro Se Litigation: Identifying Education and Training Opportunities. The Center is preparing two resources to help the district courts manage non-prisoner civil pro se litigation. The first is an educational video on dealing with mentally ill or difficult litigants, especially those who present themselves to intake staff. The second resource is an intranet site where the Center will make available to the courts a rich collection of information the Center has collected from each of the district courts regarding their practices with *pro se* litigants. This information will be kept up-to-date. We anticipate launching the site in the near future.

On-Line Resources on Courtroom Technology. The Center is creating intranet (cwn.fjc.dcn) and Internet (www.fjc.gov) web sites to help judges assess the admissibility of electronic evidence and to help Judicial Conference committees and others evaluate needs for rule and policy changes. The site contains *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, which describes the substantive and procedural considerations that may arise when lawyers bring electronic equipment into the courtroom or use court-provided equipment for displaying or playing evidentiary exhibits or illustrative aids during trial. The site also contains descriptions of other Center projects on courtroom technology, including a project on the use of videoconferencing in criminal proceedings and a project on the use of animations, simulations, and immersive virtual environment technology.

Citations to Published and Unpublished Cases in Federal Appellate Courts: Research Method Summary

Tim Reagan
Federal Judicial Center
December 17, 2004

The Appellate Rules Advisory Committee has proposed a new Rule 32.1, which would permit attorneys and courts in federal appeals in all circuits to cite unpublished opinions of the courts. Currently, by local rules, four courts (in the Second, Seventh, Ninth, and Federal Circuits) forbid citation to unpublished opinions in unrelated cases, six courts (in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits) permit but discourage citation to unpublished opinions in unrelated cases, and the other three courts (in the Third, Fifth, and District of Columbia Circuits) more freely permit citation to unpublished opinions.

At its June 2004 meeting, the Standing Committee asked the Appellate Rules Advisory Committee to ask the Federal Judicial Center to conduct empirical research that would yield results helpful to the Standing Committee's consideration of the Appellate Rules Advisory Committee's proposed rule.

Our research effort has three principal prongs to: (1) a survey of cases, (2) a survey of judges, and (3) a survey of attorneys.

Survey of Cases

We will examine the case files of a random sample of 50 cases in each of the 13 circuits to determine the following:

(a) How often are unpublished opinions cited in briefs and opinions?
(b) Under what circumstances are unpublished opinions cited in briefs and opinions?
(c) For context, what sort of authorities do briefs and opinions cite, and how often?
    i. Supreme Court opinions.
    ii. Published opinions by the circuit's court of appeals.
    iii. Published opinions by other courts of appeals.
    iv. Published opinions by the district court from which the case came.
    v. Published opinions by other district courts in the circuit.
    vi. Published opinions by district courts in other circuits.
    vii. Published state court opinions.
    viii. Unpublished opinions.
    ix. Other authorities.
(d) How long are published and unpublished opinions?

We will study cases filed in 2002. We want to study cases that have been filed recently enough so as to maximize the amount of material that will be available on-line, but long enough ago so that the vast majority of them will be over by the end of our study. The Administrative Office maintains a list of all appellate cases filed in the 12 geographic circuits – we will select at random 50 cases from each circuit whose case numbers begin with "02–." For the Federal Circuit, the first two digits of the case number refer to *fiscal* year filed rather than *calendar* year filed, and the Administrative Office does not maintain a list of these cases. But we can select from the court's Web site cases beginning "02–" or "03–" and filed in calendar year 2002.

We will review the docket sheets of all selected cases, noting whether the case was terminated by unpublished order, unpublished opinion, or published opinion. We will examine all briefs filed by counsel and tabulate cited authorities. We will not examine *pro se* briefs, because they are sometimes difficult to examine and they would slow down the research. Also, citation practices by counsel are more relevant to the research than citation practices by *pro se* parties. Nor will we examine memoranda supporting motions, because these very often contain few citations and examining them would slow down the research. We will examine both published and unpublished opinions terminating the cases and tabulate cited authorities.

We will not tabulate citations to statutory materials, because such citations are too difficult to enumerate. For example, do citations to two different subsections of a United States Code title count as one or two authorities?

We will analyze and describe the circumstances of all citations to unpublished opinions.

Docket sheets are readily available on-line for all appellate cases. Most opinions – both published and unpublished – are available on-line through PACER, the courts' Web sites, and Westlaw. Briefs are available on-line for at least some cases in approximately half of the circuits. We will have to ask the courts to provide us with paper copies of documents that we want to review that are not on-line.

Survey of Judges

We will transmit to all federal appellate judges a questionnaire containing 6 to 18 questions, depending upon circuit. The questions chiefly concern workload implications of citations to unpublished opinions.

Survey of Attorneys

We will ask attorneys whether they would have wanted to cite unpublished opinions in specific cases and whether the ability to cite unpublished opinions is likely to have an impact on their workloads.

We will survey the attorneys who participated in the cases we selected for the case survey that were fully briefed.

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Rule 11 Survey

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe habor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of your own experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

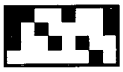
For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation*.

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

- ☐ a) There is no problem.
- ☐ b) There is a very small problem.
- ☐ c) There is a small problem.
- ☐ d) There is a moderate problem.
- ☐ e) There is a large problem.
- ☐ f) There is a very large problem.
- ☐ g) I can't say.



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1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? Please mark one.

☐ a) There has never been a problem.

☐ b) The problem is much smaller now than it was then.

☐ c) The problem is slightly smaller now than it was then.

☐ d) The problem is the same now as it was then.

☐ e) The problem is slightly larger now than it was then.

☐ f) The problem is much larger now than it was then.

☐ g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

☐ a) I strongly support Rule 11's safe harbor provision.

☐ b) I moderately support Rule 11's safe harbor provision.

☐ c) I moderately oppose Rule 11's safe harbor provision.

☐ d) I strongly oppose Rule 11's safe harbor provision.

☐ e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.

☐ f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? Please mark one.

☐ a) Rule 11 activity has increased substantially

☐ b) Rule 11 activity has increased slightly

☐ c) Rule 11 activity has remained about the same

☐ d) Rule 11 activity has decreased slightly

☐ e) Rule 11 activity has decreased substantially

☐ f) I can't say.

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3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be required to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

☐ a) Yes

☐ b) No

☐ c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

☐ a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.

☐ b) No, an award of attorney fees should not be mandatory.

☐ c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

☐ a) deterrence (and compensation if warranted for effective deterrence)

☐ b) compensation only

☐ c) both compensation and deterrence

☐ d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

☐ a) Yes

☐ b) No

☐ c) I can't say.

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Please mark all that apply

☐ a) Obtaining such information would require little or no additional effort
☐ b) Obtaining such information would require examining prior docket records for past violations
☐ c) Obtaining such information would require creating a new database for Rule 11 violations
☐ d) Obtaining such information would require an affidavit or declaration from each attorney
☐ e) Obtaining such information would require other court action (specify) _____
☐ f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11. Please mark one:

☐ a) The value of the deterrent effect would greatly exceed its cost
☐ b) The value of the deterrent effect would somewhat exceed its cost
☐ c) The value of the deterrent effect would about equal its cost
☐ d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
☐ e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
☐ f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

☐ a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
☐ b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
☐ c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
☐ d) There is no significant difference among the three options.
☐ e) I can't say

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6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

☐ a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
☐ b) Rule 11 is needed, and it is just right as it now stands.

☐ c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings.
☐ d) Rule 11 is not needed.

☐ e) I can't say

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The version of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

☐ a) I prefer the current Rule 11

☐ b) I prefer the 1983-1993 version of Rule 11

☐ c) I prefer the proposed legislation

☐ d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

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

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JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: December 13, 2004

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 9, 2004, in Miami, Florida. The Committee approved three amendments for publication, removed five items from the Committee's study agenda, and, at the request of the E-Government Subcommittee, discussed again a draft rule intended to protect sensitive information in court filings. The Committee also gave extended attention to the fact that all of the courts of appeals use their local rules to impose requirements on briefs — requirements that are not found in Appellate Rule 28 and, in some cases, conflict with Appellate Rule 28.

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

II. Action Items

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

III. Information Items

A. Amendments Approved for Expedited Submission to the Standing Committee

At the request of the Standing Committee and the Committee on Court Administration and Case Management ("CACM"), the Advisory Committee approved for publication on an expedited schedule a proposed amendment to Appellate Rule 25(a)(2)(D) that would authorize courts to require papers to be filed by electronic means.

B. Amendments Approved for Later Submission to the Standing Committee

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

- An amendment to Rule 4(a)(1)(B) that will make clear that the extended 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

- An amendment to Rule 40(a)(1) that will make clear that the extended 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

C. Electronic Privacy

We were fortunate that Prof. Daniel Capra was able to join our November meeting via speaker phone and give us a progress report on the efforts to develop the privacy rules required by the E-Government Act of 2002. Prof. Capra brought us up to date on the actions of the Bankruptcy, Civil, and Criminal Rules Committees, all of whom met before we did. Prof. Capra also outlined for us some of the policy choices that confront the rules committees as we go forward.

Following a lengthy discussion, the Appellate Rules Committee tentatively decided that it will take an approach to this issue that differs from the approach being taken by the Bankruptcy, Civil, and Criminal Rules Committees. At this point, we are inclined to believe that the Appellate Rules should simply incorporate by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. We need to give more thought to the precise wording of the Appellate Rules, but they will likely provide that, for purposes of the privacy rules, a case filed in the court of appeals will be treated as

though it had been filed in the district court — and thus that the Bankruptcy, Civil, and Criminal Rules on privacy will apply just as they would if the case was pending in the district court.

For obvious reasons, privacy and security issues concern the trial courts more than the courts of appeals. The Appellate Rules Committee believes that the policy choices should therefore be made by CACM and the Bankruptcy, Civil, and Criminal Rules Committees; the Appellate Rules Committee has no interest in second-guessing those decisions. At the same time, it would be difficult for the Appellate Rules Committee to continually amend the Appellate Rules to keep up with every change made to the privacy provisions of the Bankruptcy, Civil, or Criminal Rules. Moreover, gaps would develop, as "conforming" changes to the Appellate Rules would often lag behind changes to the other rules of practice and procedure. By simply incorporating the other rules by reference, the Appellate Rules can take a "dynamic conformity" approach — that is, the decisions of the other advisory committees will automatically become the decisions of the Appellate Rules Committee, and changes in the other rules of practice and procedure will automatically be reflected in the Appellate Rules.

D. Local Rules on Briefs

As I have reported in the past, the Advisory Committee continues to receive complaints from the bar about variations in local rules regarding briefs. Appellate Rule 32(e) provides that every court of appeals must accept briefs that meet the requirements of Rule 32 — regarding such matters as binding, paper size, typeface, type styles, and length. But no such "local variation" provision exists with respect to the requirements of Rule 28 — regarding such matters as the contents of briefs, references to the record, and the reproduction of statutes and rules. As a result, every circuit imposes different requirements on briefs, and parties have no alternative but to comply with those requirements. The situation is aggravated by the fact that some clerks' offices reportedly ignore the dictate of Rule 25(a)(4) that "[t]he clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required . . . by any local rule or practice."

The Committee decided that, before giving further consideration to this matter, it needed to be better informed about precisely how many variations are in existence, the history of those variations, and the degree to which those variations are enforced in practice. The Federal Judicial Center ("FJC") kindly agreed to assist the Committee in gathering this information.

At our November meeting, Marie Leary from the FJC presented a comprehensive report entitled, "Analysis of Briefing Requirements in the United States Courts of Appeals." Ms. Leary's report indicated that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in Rule 28. She found that over half of the courts of appeals impose seven or more such requirements, and that some of those requirements flatly contradict Rule 28.

The Committee discussed Ms. Leary's report at length. Members of the Committee disagreed about whether the variations in circuit practices represent a serious problem. Some members

expressed deep frustration with the numerous local rules on briefs, arguing that they substantially undermine the central purpose of the rules of practice and procedure and impose a considerable hardship on practitioners. Other members questioned the degree of hardship and argued that differences in the briefing requirements reflect the fact that the circuits differ substantially in the size and nature of their caseloads, in the number and geographical dispersion of their judges, in their local legal cultures, and in many other ways.

Despite their differences, Committee members agreed that bringing about uniformity or near-uniformity in the rules regarding briefs would be impossible. Rightly or wrongly, the circuits feel very strongly about their local rules on this topic, and any attempt by the Committee to sweep away those rules is unlikely to succeed. That said, the Committee nevertheless hopes to promote uniformity by proposing, from time to time, discrete changes to Rule 28. More importantly, the Committee has tentatively decided to mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the local rules identified by Ms. Leary and, where possible, to revoke those rules or make them more consistent with Rule 28. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

I should stress that the Committee's plan is tentative, and we will revisit this issue at our April 2005 meeting. I should also stress that no letter to the circuits will be sent until after the dispute over proposed Rule 32.1 is resolved. The Committee would welcome any advice or guidance that the Standing Committee would care to give about this topic.

DRAFT

Minutes of Fall 2004 Meeting of
Advisory Committee on Appellate Rules
November 9, 2004
Miami, Florida

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, November 9, at 8:30 a.m., at the Wyndham Grand Bay Coconut Grove Hotel in Miami, Florida. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

II. Approval of Minutes of April 2004 Meeting

The minutes of the April 2004 meeting were approved.

III. Report on June 2004 Meeting of Standing Committee

Judge Alito reported that, at its June 2004 meeting, the Standing Committee gave final approval to all of the proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"), with one exception. Those proposals were subsequently approved by the Judicial Conference and now are awaiting Supreme Court action.

The exception was proposed Rule 32.1 on the citation of unpublished opinions. Judge Alito reported that the Standing Committee had returned the proposal to this Advisory Committee for further study. Judge Alito said, and Prof. Coquillette agreed, that the decision of the Standing Committee did not signal a lack of support for the proposal. Rather, given the strong opposition to the proposal expressed by many commentators, and given that some of the claims of those commentators can be tested empirically, the Standing Committee wanted to ensure that every reasonable step is taken to gather information before it makes a final decision on the proposal.

Judge Alito announced that Dr. Reagan and his colleagues at the FJC had already designed a study, with input from Judge David F. Levi (Chair of the Standing Committee), Judge Alito, Prof. Coquillette, and Prof. Schiltz. Judge Alito distributed a description of the study and the survey instruments that will be used in the study. At Judge Alito's invitation, Dr. Reagan then described his intended research and answered questions from Committee members.

Mr. Rabiej said that the AO was also conducting research to assist the Standing Committee and Advisory Committee in their consideration of Rule 32.1. In particular, the AO is trying to determine whether citation rules correlate with either disposition times or the percentage of appeals disposed of without published opinions. To date, Mr. Rabiej said, the AO has not found much evidence of a correlation.

Judge Alito thanked Dr. Reagan and Mr. Rabiej for the assistance of their offices.

IV. Action Items

A. Item No. 03-10 (new FRAP 25.1 — electronic filing/privacy protections)

Judge Alito took up Item No. 03-10 out of order so that Prof. Daniel J. Capra, who joined the meeting via speaker phone, could lead the discussion. Prof. Capra is the Reporter to the Advisory Committee on Evidence Rules and is serving as the Lead Reporter to the E-Government Subcommittee.

Prof. Capra said that the E-Government Act of 2002 requires the federal courts to make most of their files accessible electronically and requires the advisory committees to propose amendments to the rules of practice and procedure to address the privacy and security concerns that will be raised when court files become available over the Internet. Prof. Capra said that the Standing Committee had appointed the E-Government Subcommittee to coordinate the efforts of the advisory committees to develop such rules. The first task of the Subcommittee was to come up with a template that reflected the major policy decisions that had already been made by the Committee on Court Administration and Case Management ("CACM") and that the advisory committees could then use in drafting amendments to their respective sets of rules.

Prof. Capra said that the most important policy decision made by CACM was that "public should remain public" — meaning that anything that has traditionally been available to the public at the courthouse should continue to be available to the public over the Internet. Remote electronic access will mean, though, that information that in the past would have been stored deep in the bowels of a courthouse will now be readily available to anyone with a computer and an Internet connection. For that reason, CACM has decided that particularly sensitive information — such as Social Security

numbers — should be redacted from all filings, so that the information no longer appears in either paper or electronic court files. Such redaction will, among other things, protect against identity theft. At the same time, CACM has recognized that there must be a limited number of exceptions to the redaction requirement, such as when redacting a filing would be extremely burdensome.

Reflecting these decisions, the current template provides as follows:

First, certain information will be redacted from *all* filings — paper and electronic. For example, parties will be required to redact from all filings the first five digits of Social Security numbers.

Second, some filings will be exempt from the redaction requirement, but will be available to the public over the Internet. In these cases, the privacy interests that would be protected by redaction are outweighed by the inconvenience that redaction would cause to the court and parties. For example, in a civil or criminal forfeiture proceeding, the number of the financial account that is the subject of the proceeding would not have to be redacted from filings.

Third, some filings will be exempt from the redaction requirement and will not be available to the public over the Internet (although the filings will continue to be available to the public at the courthouse). Filings in Social Security appeals are likely to receive this treatment. Requiring redaction of personal information from such filings would impose a significant burden on the government, both because of the high volume of Social Security appeals, and because those appeals involve a great deal of sensitive information.

Finally, parties will continue to be able to seek court permission to file documents under seal. Nothing will have to be redacted from a document filed under seal, for the obvious reason that such a document will not be available either at the courthouse or electronically. If a sealed document is later "unsealed," sensitive information will first have to be redacted.

Prof. Capra concluded his remarks by mentioning three issues that had been raised at the recent meetings of the Civil Rules Committee and the Criminal Rules Committee. First, the Civil Rules Committee decided that immigration cases should be treated like Social Security cases — that is, they should be exempt from the redaction requirement and protected from remote electronic access. Second, the Criminal Rules Committee decided that habeas proceedings should be exempt from the redaction requirement, but should be accessible over the Internet. Finally, both the Civil and Criminal Rules Committees noted the special problem of trial exhibits. In some district courts, trial exhibits are not filed, and thus will be neither available electronically nor subject to the privacy provisions of the Civil and Criminal Rules. When an appeal is brought, those trial exhibits will be filed with the court of appeals, and thus may become available electronically. The Appellate Rules Committee will have to address such filings.

Judge Alito asked Prof. Schiltz if he had anything to add to Prof. Capra's remarks. Prof. Schiltz said that, to date, the proposed rules that he had been drafting had directly incorporated the decisions being made by CACM and the other advisory committees. For example, if one of the other committees decided that financial account numbers should be redacted, draft Appellate Rule 25.1 provided the same. If one of the other committees decided that Social Security appeals should be exempt from both the redaction requirement and remote electronic access, then draft Rule 25.1 provided similar exemptions.

Prof. Schiltz said that he was now inclined to believe that the Appellate Rule should be drafted differently. Instead of trying to keep up with changes in the Civil or Criminal Rules, the Appellate Rule should take a "dynamic conformity" approach. In other words, the Appellate Rule should simply incorporate by reference the privacy provisions of the Civil and Criminal Rules. One way the Appellate Rule could do this is by providing that whatever privacy rules applied to a case before it was appealed will continue to apply to the case on appeal. In appeals from district courts, the Civil or Criminal Rules would apply. In administrative proceedings, the privacy rules of the agency would apply. Another way the Appellate Rules could do this is to provide that, for purposes of the privacy rules, a case filed in the court of appeals will be treated as though it had been filed in the district court — and thus that the Civil and Criminal Rules will apply to the same extent that they apply in district-court cases.

Prof. Schiltz said that everyone seems to agree that privacy issues are of more concern to the trial courts than to the courts of appeals and that the issues should therefore be addressed primarily by CACM and the Bankruptcy, Civil, and Criminal Rules Committees. It would be difficult for the Appellate Rules Committee to continually amend Appellate Rule 25.1 to keep up with changes to the other rules of practice and procedure. Moreover, gaps would develop, as "conforming" changes to the Appellate Rule would often lag behind changes to the Bankruptcy, Civil, and Criminal Rules. The Appellate Rule should adopt the other rules by reference, so that changes to the other rules are automatically reflected in the Appellate Rule.

After a brief discussion, the Committee agreed that the policy choices should be left to CACM and the other advisory committees, and that the Appellate Rules should not differ substantively from the Bankruptcy, Civil, or Criminal Rules. The Committee also agreed that, if Prof. Schiltz can find a way to implement it, the "dynamic conformity" approach would work well. Prof. Schiltz said that he would try to draft a "dynamic conformity" rule for the Committee to consider at its April 2005 meeting. Among issues that the Committee will need to consider are how to handle: (1) review of agency actions (given that most agencies do not have privacy rules), (2) mandamus and similar proceedings (which are brought directly in the courts of appeals), and (3) trial exhibits (some of which, as described above, are not filed until a case is appealed).

Most of the remainder of the Committee's discussion focused on the decision of the Civil Rules Committee to exempt immigration cases from the redaction requirement and to forbid remote electronic access to the files in such cases. One member defended the decision, arguing that the government does

not have the resources to redact those files, and pointing out that members of the public will have the same access to those files that they do now (that is, access at the courthouse, but not over the Internet). Other members questioned whether filings in immigration cases contained enough sensitive information to warrant such treatment. Both Prof. Coquillette and Prof. Capra acknowledged that the exemption for immigration cases is controversial and faced an uncertain future.

Ms. Waldron raised two issues that may need further consideration by the Civil or Criminal Rules Committee. First, aliens who are subject to deportation sometimes file habeas petitions to challenge their detention. Will those cases be treated as habeas cases or as immigration cases? Second, prisoners sometimes file *pre-trial* habeas petitions. Should those be exempt from the redaction requirement, as would "typical" habeas proceedings under the Criminal Rules Committee's proposal?

Judge Alito thanked Prof. Capra for his assistance to the Committee and said that, at the Committee's April 2005 meeting, the Committee will hopefully be able to approve a "dynamic conformity" rule for publication.

B. Item No. 97-14 (FRAP 46(b)(1)(B) — "conduct unbecoming" standard)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Item No. 97-14 encompasses a group of proposals ranging from, on one extreme, enacting a comprehensive "Federal Rules of Attorney Conduct" to, on the other extreme, tinkering with the "conduct unbecoming" standard of Rule 46(b)(1)(B). This item was added to the study agenda of the Appellate Rules Committee — and similar items were added to the study agenda of other advisory committees — in 1997 at the request of the Standing Committee.

Two developments provided the impetus for the Standing Committee's request. First, the Standing Committee's "Local Rules Project" found that the district courts had implemented as part of their local rules a large number of provisions governing the professional conduct of attorneys — provisions that were, on the whole, vague, confusing, and conflicting. Those provisions not only conflicted with each other, but often conflicted with the rules imposed by the states. Second, the Clinton Justice Department and several state courts were involved in a heated controversy over the interpretation and enforcement of Model Rule 4.2. Some states had interpreted Model Rule 4.2 to prohibit attorneys working for law enforcement agencies from having ex parte contacts with the employees of organizations that were under criminal investigation. The Department sought to use the Rules Enabling Act process to enact rules that would protect federal law enforcement agents from this broad interpretation of Model Rule 4.2 (as well as from broad interpretations of other rules, such as Model Rule 3.8).

The Reporter recommended that Item No. 97-14 be removed from the Committee's study agenda. The item has been dormant for a long time. For a number of reasons — including the presidential election of 2000 and change in administrations; the September 11 attacks and resulting reordering of federal law enforcement priorities; and changing personnel in the Department of Justice — the Department has not been able to give Item No. 97-14 sustained attention. The subcommittee established by the Standing Committee to coordinate work on this issue has not met since 2000, and this Committee has not even received an update since April 2001.

Prof. Coquillette said that he agreed with the recommendation. He said that it is unlikely that this issue will be a high priority for the Justice Department in the next year or two. In addition, when the Department again takes up this issue, it may try for a legislative solution rather than a rules-based solution.

A member moved that Item No. 97-14 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Item No. 99-06 (FRAP 33 — impact of settlements on bankruptcy proceedings)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Item No. 99-06 was added to the Committee's study agenda in 1999 at the request of the bankruptcy judges of the Fourth Circuit. Those judges expressed concern that Appellate Rule 33 — which authorizes an appellate court to order the parties to engage in a settlement conference and provides that the court may "enter an order . . . implementing any settlement agreement" — did not incorporate the notice provisions of Bankruptcy Rules 9019(a) and 7041. Those rules contain provisions designed to protect against the debtor cutting a "sweetheart" deal with one creditor to the detriment of other creditors or the bankruptcy estate. Under Bankruptcy Rule 9019(a), any proposed settlement affecting a bankruptcy estate must be approved by the bankruptcy court after notice of the proposed settlement is given to all of the creditors. And, under Bankruptcy Rule 7041, a complaint objecting to the discharge of a debtor cannot be dismissed at the request of the plaintiff alone; rather, the bankruptcy court must approve the dismissal after notice is given to the trustee.

The concerns of the Fourth Circuit bankruptcy judges were referred by this Committee to the Bankruptcy Rules Committee. After discussing this matter at two meetings, the Bankruptcy Rules Committee decided to recommend that this Committee remove Item No. 99-06 from its study agenda. The Bankruptcy Rules Committee is unaware of any evidence that the problem identified by the Fourth Circuit bankruptcy judges has actually materialized. To the contrary, in the experience of those who serve on the Bankruptcy Rules Committee, when a settlement that might affect the rights of absent creditors is reached on appeal of a bankruptcy case, the court of appeals will remand the case to the

district court with instructions to remand the case to the bankruptcy court, so that the bankruptcy court can ensure compliance with Bankruptcy Rules 9019(a) and 7041.

A member moved that Item No. 99-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

D. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(a) the United States;

(b) a United States agency;

(c) a United States officer or employee sued in an official capacity; or

(d) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which extended the 60-day period to respond to complaints to such cases. The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or~~

~~agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

The Reporter reminded the Committee that, at its April 2004 meeting, it had tentatively approved the Justice Department's proposal that Rules 4(a)(1)(B) and 40(a)(1) be amended to make clear that the extended time periods apply in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions that occurred in connection with duties that he or

she performed on behalf of the United States. The Committee asked the Reporter to take a close look at the amendments and Committee Notes proposed by the Department, make appropriate stylistic changes, and present a final version at this meeting.

The Reporter said that he had rewritten the amendments to comply with the style conventions and to ensure that the text of the amendments will better match up with the text of restyled Civil Rules 12(a)(2) and (3). The Reporter also said that he had shortened the Committee Notes.

Mr. Letter said that the Department supported the revised amendments and Notes and had only two minor suggestions with respect to the Note to the amendment to Rule 4(a)(1)(B). First, the Department would like to replace the phrase "which extended the 60-day period to respond to complaints to such cases" with the phrase "which specified an extended 60-day period to respond to complaints in such cases." Second, the Department would like to insert the words "the Solicitor General to" in the last sentence of the rule, after "additional time to" and before "decide whether to file an appeal." By consensus, the Committee agreed to the changes.

A member moved that the amendments to Rules 4(a)(1)(B) and 40(a)(1) be approved for publication. The motion was seconded. The motion carried (unanimously).

E. Item No. 04-04 (FRAP 25(a) — authorize courts to mandate electronic filing)

The Reporter introduced the following proposed amendment and Committee Notes:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that

the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 25(a)(2)(D).

The Reporter said that CACM has asked that the rules of appellate, bankruptcy, civil, and criminal procedure be amended on an expedited basis to authorize the federal courts to use their local rules to force parties to file all documents electronically. CACM believes that mandatory electronic filing will achieve significant cost savings for the federal courts. CACM also points out that many bankruptcy courts and district courts are already requiring electronic filing, and that many more are likely to follow suit. It would be best for all if the national rules would authorize what the federal courts apparently are going to do anyway.

The Reporter said that the proposed amendment to Rule 25(a)(2)(D) and accompanying Committee Note are identical to amendments that have already been approved by the Bankruptcy Rules Committee and Civil Rules Committee at their meetings earlier this fall. The Standing Committee hopes that this Committee will follow suit, as the Standing Committee would like to expedite consideration of these amendments as follows: The amendments will be published for comment on November 15, 2004. The comment period will expire on February 15, 2005. The advisory committees will consider the comments and give final approval to the amendments at their spring 2005 meetings. The Standing Committee will consider the rules at its June 2005 meeting, and the Judicial Conference will consider them in September 2005.

Members expressed several concerns about the proposal. Members were concerned that mandatory electronic filing could pose a hardship for some litigants, and wondered whether the national rules should be amended to protect such litigants. Other members expressed concern about the lack of uniformity that would result from the amendments, with some courts requiring electronic filing, others allowing but not requiring electronic filing, and still others forbidding electronic filing. And almost all members agreed that they would not support an amendment that would force courts to accept electronic filings.

The Reporter said that he shared the concerns of the members, and that he had been among those who had unsuccessfully objected to considering CACM's proposal on an expedited basis. But he also reminded the Committee that, at this point, the Committee is being asked only to approve the proposal for publication. The Committee's concerns can be revisited in April, when the Committee will have the benefit of public comment on the rule. The Reporter also reminded the Committee that the rule would merely give courts the option to require electronic filing; it would not force any court to accept any electronic filing or forbid any court from requiring paper filings. Finally, the Reporter said that, although uniformity is important, it is also sometimes important to allow courts to experiment and gain experience that can inform later national rulemaking. This is particularly true in the area of technology. Mr. Rabiej added that, in the districts that have already implemented mandatory electronic filing, both the courts and the parties have been very happy with the results.

A member moved that the proposed amendment to Rule 25(a)(2)(D) be approved for publication. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item Nos. 02-16 & 02-17 (FRAP 28 & 32 — inconsistent local rules on briefs and covers of briefs)

Judge Alito reminded the Committee that Item Nos. 02-16 and 02-17 arose out of complaints by the ABA Council of Appellate Lawyers about variations in local circuit rules regarding briefs and covers of briefs. The Committee discussed the ABA's concerns at length at its November 2003 meeting. At that meeting, Judge Levi warned the Committee that any proposed changes to briefing requirements were likely to be resisted by members of the Judicial Conference. He said that the Conference was unlikely to be persuaded simply by arguments that national uniformity is important or that a particular change is thought by a majority of the Committee to be a good idea. Rather, if a proposed change to Rule 28 is to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the change — for example, evidence that two-thirds of the circuits have already adopted the change — and the organized bar will have to get behind the change.

Members of the Committee agreed with Judge Levi. The Committee voted to table further discussion of Item Nos. 02-16 and 02-17 and to request the FJC to collect further information for the Committee. Specifically, the Committee asked the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28 and to try to learn the reason for each variation and assess the degree to which each variation is enforced in practice.

After an exhaustive study, Ms. Leary and the FJC produced a comprehensive report entitled, "Analysis of Briefing Requirements in the United States Courts of Appeals." The report was included under Tab V-A in the Committee's agenda book. Judge Alito thanked Ms. Leary for her excellent work and invited her to discuss that work with the Committee.

Ms. Leary told the Committee that the information compiled in the FJC's report came from a close review of local rules, standing orders, practitioner guides, and the like, as well as from questionnaires sent to every circuit executive. Ms. Leary said that she found that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in Rule 28. She said that over half of the courts of appeals impose seven or more such requirements. Ms. Leary then reviewed in detail the findings described in her report.

Judge Alito again thanked Ms. Leary for her work and suggested to the Committee that, before it dug into the details of the report, the Committee should discuss a fundamental underlying question: Should this Committee undertake a major effort to bring about uniformity — or near-uniformity — in briefing requirements, recognizing that such an effort would take a great deal of time and energy and likely be met with strong resistance from circuit judges? Or should this Committee instead try to marginally improve uniformity by enacting "pinpoint" changes and by encouraging the circuits to revoke unnecessary local rules?

Several members addressed Judge Alito's question. Some expressed deep frustration with the numerous local rules on briefs, arguing that they substantially undermine the central purpose of the rules of practice and procedure. A lawyer should be able to read the Appellate Rules and know how to file a brief in any federal court of appeals. No lawyer should have to wade through pages of local rules, practitioner guides, internal operating procedures, and standing orders every time he wants to file a brief. Nor should any attorney have to deal with the constant frustration of being told by the clerk that he must file a corrected brief because he failed to follow an obscure or picayune local rule. These local variations waste the time of attorneys and the money of clients. Some members also argued that many of the local variations appear to accomplish little, but rather seem to be in place for no better reason than "we've always done it this way." The bottom line for some members is that the local rules on briefing create considerable hardship for practitioners and little or no corresponding benefit for judges.

Other members responded in several ways:

First, some members argued that bringing about uniformity in briefing would be impossible. Rightly or wrongly, the circuits feel very strongly about their local rules on briefing, and any attempt by the Committee to sweep away those local rules is doomed to fail. It would be unwise to invest a great deal of time and effort in an endeavor that is likely to do nothing but provoke the ire of the circuit judges.

Second, in the view of some members, the desire of circuits to impose their own rules on briefing is reasonable. Circuits vary substantially in the size and nature of their caseloads, in the number and geographical dispersion of their judges, in their local legal cultures, and in many other ways. Circuits must operate differently, and the differences in briefing requirements reflect that fact.

Third, some members argued that experimentation with briefing should be encouraged, especially in an era of rapidly changing technology, communications, transportation, and the like. The experiences of the circuits with various rules and practices can help inform this Committee's consideration of proposed changes to Rule 28.

Finally, some members expressed skepticism about the degree to which local rules on briefing create a hardship. Most attorneys practice in only one circuit, and most of those who practice in multiple circuits work for large organizations (such as the Department of Justice) or large law firms. Such lawyers should have little problem finding and following local rules on briefing. Moreover, the Committee cannot possibly wipe out all local rules on all subjects, and thus, no matter what the Committee does, lawyers will still have to read and follow local rules. It's just a fact of life that, when an attorney files a brief in a circuit, the attorney needs to follow the local rules of that circuit — just as it's a fact of life that, when an attorney files a brief in a state court, the attorney needs to follow the local rules of that county or judicial district.

After a lengthy discussion, the Committee reached a consensus on the following:

1. The Committee will not undertake a major effort to bring about uniformity or near-uniformity in briefing requirements. Although members disagree about the importance of uniformity in this area, all agree that uniformity is not achievable.

2. The Committee will continue to be open to proposals to amend Rule 28 to implement specific practices that have proven helpful.

3. In an effort to bring about more uniformity, Judge Alito will mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the rules identified by Ms. Leary and, where possible, to revoke those rules or make them more consistent with Rule 28. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

Several members suggested that the problem here may be one of awareness — of circuits not fully appreciating just how many local rules they've implemented, how difficult those rules are for practitioners to locate and piece together, and how many ways those rules differ from Rule 28 and the rules of other circuits. Circuits may welcome the information contained in Ms. Leary's report and welcome the opportunity to review their local rules in light of that information.

Prof. Coquillette supported the Committee's decision. He said that the Standing Committee would rather use persuasion than compulsion to increase uniformity in this area. He also said that the Local Rules Project demonstrated that persuasion can be effective.

One member raised the possibility that Ms. Leary's study and Judge Alito's letter could be expanded to include rules regarding appendices. Other members argued against such an expansion. At the November 2003 meeting, the Committee agreed that it would take no action with respect to appendices. There is enormous variation among local circuit rules regarding appendices; indeed, no two circuits have the same rules. Bringing about substantially more uniformity would require just about every circuit to make significant changes to its local practices. These local practices are deeply rooted, and judges feel strongly about them. The Committee is wiser to focus on the issue of briefs, where there is more uniformity to begin with, and where progress toward still more uniformity can realistically be achieved.

A member said that, while he supported the notion of using persuasion rather than rulemaking, he preferred to wait until the controversy over proposed Rule 32.1 is resolved before raising this issue with the circuits. The Committee agreed. By consensus, the Committee agreed that the Reporter, with the help of a couple of Committee members, should prepare a draft letter that can be reviewed by the Committee at its April 2005 meeting. Mr. Letter and Mr. Levy volunteered to work with the Reporter on the draft letter.

B. Item No. 04-01 (FRAP 5(c) et al. — replace page limits with word limits)

Judge Alito invited the Reporter to introduce this item.

The Reporter reminded the Committee that, at its last meeting, a member asked to add to the Committee's study agenda the proposal that all of the page limitations in FRAP be replaced with word limitations. The Reporter said that this is the third time in the seven years that he has served as Reporter that this proposal has appeared on the Committee's study agenda and that the proposal has been informally discussed on at least a couple of additional occasions. Every time the idea has been floated — most recently, in April 2002 — the Committee has unanimously decided not to proceed with it. The reasons that Committee members have given for not proceeding with word limitations include the following:

1. There is no compelling reason to replace page limitations with word limitations. The clerks have not complained about the page limitations; to the contrary, the clerks have consistently said that the page limitations work fine and should not be disturbed. Attorneys have also not complained about the page limitations.

2. The clerks strongly prefer page limitations because they are easy to enforce. A clerk can tell at a glance whether a paper exceeds 20 pages. By contrast, word limitations are difficult to enforce. A clerk cannot tell at a glance whether a paper exceeds 7,500 words; such a limitation can be enforced only by counting words, and no clerk has time to count words.

3. Clerks are able to enforce the type-volume limitation on briefs only because parties are required to file a certificate of compliance. For word limitations to work, then, FRAP would have to be amended not just to replace every page limitation with a word limitation, but to require that a certificate of compliance be filed with every document subject to a word limitation, such as every petition for rehearing. That would add thousands of pages to the files of attorneys and courts, and it would add substantially to the workload of clerks, who would often have to contact attorneys and ask them to supply missing certificates.

4. If the Committee replaced page limitations with word limitations, and the Committee required that compliance with the new word limitations be certified, then the Committee would also have to decide whether to amend the appendix of forms to include certificates of compliance similar to Form 6. If the Committee did so, the Committee would further have to decide whether to amend various rules to provide that the use of the new forms "must be regarded as sufficient to meet the requirements" of the various word limitations, as Rule 32(a)(7)(C)(ii) provides with respect to the type-volume limitation on briefs.

5. Word limitations and other restrictions (such as restrictions regarding typeface and type styles) were imposed on briefs because abuses were a real problem. The clerks have consistently asserted that abuses are not a problem with regard to motions, rehearing petitions, and other documents. And, as noted above, clerks have also consistently said that the abuses that do exist are better controlled through page limitations than through word limitations.

For all of these reasons, the Committee has several times in the past seven years declined to proceed with suggestions that the page limitations in FRAP be replaced with word limitations. The Reporter recommended that the Committee again remove this proposal from its study agenda.

A member disagreed. He said that word limitations present several advantages over page limitations. First, they reduce gamesmanship. Second, they allow attorneys to use larger typeface. And third, they make it easier to edit papers. Trying to meet page limitations sometimes requires attorneys to continue to cut words, move text in and out of footnotes, turn the "widow/orphan" feature on and off, and experiment with other measures until the page breaks fall just right.

Other members opposed changing all of the page limitations into word limitations. In their view, word limitations offer, at best, only minor improvements and do not justify making extensive changes to FRAP — especially changes that are opposed by the clerks who would have to enforce word limitations.

Mr. Rabiej said that it may become easier to enforce word limitations as electronic filing becomes commonplace. A clerk could simply run a word-count program on a document. Others disagreed, point out that some formats (e.g., PDF) do not have word-count features and that running a word-count program on every document would be inconvenient for clerks, especially as some words in the document (e.g., the words in the signature block) would have to be excluded from the count.

A member moved that all of the page limitations in FRAP be replaced by word limitations. The motion was seconded. The motion failed (2-5).

By consensus, the Committee agreed to remove Item 04-01 from the Committee's study agenda.

C. Items Awaiting Initial Discussion

1. Item No. 04-02 (FRAP 12(b) — timing of representation statement)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was placed on the study agenda at the request of Mr. Dennis R. Cookish, a pro se litigant. Mr. Cookish is concerned that, under Rule 12(b), a party can be required to file a representation statement with the court of appeals before the notice of appeal filed with the district court has been transferred to the court of appeals. Thus, the court of appeals can receive a representation statement regarding a case before the court of appeals even knows that the case exists. Mr. Cookish suggests that clerks be required to notify the parties when a case is transferred to or docketed by the court of appeals, and that parties have 10 days to file a representation statement after receiving that notice.

Ms. Waldron said that she had informally surveyed the other circuit clerks about Mr. Cookish's concern, and the clerks do not think that it is a problem. It is true that the circuit clerks occasionally receive representation statements for cases that have not yet been transferred from the district court. But the clerks' offices simply hold those statements until the papers arrive, perhaps after confirming with the district clerk that a notice of appeal has been filed. Ms. Waldron said that, to the extent that the circuit clerks have a problem with representation statements, it is with the fact that they are often not filed at all and the clerk must nag the parties to submit them.

A member moved that Item No. 04-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

2. Item No. 04-03 (FRAP 4(a)(4)(A)(iii) — tolling effect of Civil Rule 54 motions)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was added to the Committee's study agenda at the request of Judge Ronald Gilman, writing in *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). In *Wikol*, the parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman, author of the Sixth Circuit's opinion, reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).

Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committees consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A).

The Reporter said that, in light of *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (which held that a judgment is final and appealable even if a motion for attorney's fees is pending), this Committee and the Civil Rules Committee essentially have three options if they wish to address the problem raised by *Wikol*:

First, the Committees could decide that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion for attorney's fees is always treated like a timely Rule 59 motion for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the Committees could decide that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion is never treated like a timely Rule 59 motion. Under this approach, a Rule 54 motion would not toll the time to appeal, and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Finally, the Committees could decide to maintain the "hybrid" approach. Under this approach, a default rule is established — at present, the default rule is that a motion for attorney's fees under Rule

54 is not treated like a Rule 59 motion — but then the district court is given authority to make exceptions to the default rule. At present, Civil Rule 58(c)(2) gives district courts authority to "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." To solve the *Wikol* problem, though, the rules would have to be amended to impose a deadline by which a district court must act. For example, a deadline could be patterned after Criminal Rule 35(a), under which a court has authority to correct a sentence within seven days after the sentence is imposed, but loses such authority after the seventh day.

The Committee discussed the options described by the Reporter. Most Committee members said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would always be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits would always have to be brought together with the appeal on the fees. In the experience of Committee members, appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason. A decision on fees can be much more difficult than a decision on the merits. District court judges often do not want to have to make a decision on fees until they know for certain that the decision on the merits will stand. Also, once the appeal on the merits is over, parties often settle the fees dispute.

Most Committee members also said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would never be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits could never be brought together with the appeal on the fees. Members pointed out that the Federal Circuit has held that, in patent infringement cases, appeals on the merits must always be packaged together with appeals on the fees. Sometimes there is good reason to present the appellate court with the merits and the fees in the same appeal.

In sum, Committee members favor maintaining the current hybrid approach, under which the assumption is that the appeals will proceed separately, unless the district court orders otherwise. Committee members believe, however, that a time limit should be added to Civil Rule 58(c)(2) so that the *Wikol* facts are not repeated. Item No. 04-03 should be referred to the Civil Rules Committee, so that it can consider approving such an amendment.

A member moved that Item No. 04-03 be referred to the Civil Rules Committee, along with the recommendation of this Committee that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2005 Meeting

The Committee will next meet on April 18 and 19, 2005, in Washington, D.C.

VIII. Adjournment

The Committee adjourned at 12:30 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2004

FRAP Item	Proposal	Source	Current Status
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04
00-08	Amend FRAP 4(a)(6) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04

FRAP Item	Proposal	Source	Current Status
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Standing Committee returned to Advisory Committee for further study 06/04; referred to Federal Judicial Center for study
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04

FRAP Item	Proposal	Source	Current Status
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study Discussed and retained on agenda 11/04
02-17	Amend FRAP 32 to eliminate local rule variations regarding contents of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study Discussed and retained on agenda 11/04
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04
04-04	Amend FRAP 25(a) to authorize courts to mandate electronic filing.	Hon. John W. Lungstrum (D. Kan.) on behalf of CCACM	Awaiting initial discussion Draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 11/04

6A-B

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

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CHAIR

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JERRY E. SMITH
EVIDENCE RULES

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

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

DATE: **December 1, 2004**

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

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 9-10, 2004, at Half Moon Bay. The Committee considered a number of issues and will continue discussion of several matters at its next meeting. The Committee also adopted several proposed amendments to the Bankruptcy Rules and Forms for recommendation to the Standing Committee. Judge Small, by letter dated September 15, 2004 provided you with an outline of proposed fast track items relating to Rules 2002(g), 5005(a)(2), 9001(9), and 9036. A copy of that letter is attached for your convenience.

II. Action Items

The Advisory Committee approved for publication (next year) a proposed amendment to Rule 1014 to allow a court on its own motion to initiate, (after notice and a hearing), a change of venue. Courts have generally held that they have authority to dismiss or transfer cases on their own motion. This amendment would recognize this authority but only after notice and a hearing. This proposed amendment was recommended by the Joint Committee on Chapter 11 Venue Issues

described in this report. The Advisory Committee requests that the Standing Committee approve this item for publication in August 2005.

The Advisory Committee approved for publication (next year) a proposed amendment to Rule 3007 which would clarify the procedure when a party objects to a claim and also attempts to seek affirmative relief at the same time. The proposed amendment would bar a party from joining in an objection to a claim the type of relief required to be brought by an adversary proceeding. A creditor may include an objection to a claim in an adversary proceeding. Unlike a contested matter, an adversary proceeding requires the service of a summons and complaint, thus putting the party served on notice of a potential affirmative recovery. The court could also consolidate a separate objection to a claim with a separate adversary proceeding for purposes of trial. The Advisory Committee requests that the Standing Committee approve this item for publication in August 2005.

The Advisory Committee approved a technical amendment to Rule 7007.1 and recommended that it be approved without publication. The proposed amendment clarifies that a party must file a corporate ownership statement with its initial paper filed with the court in an adversary proceeding. The proposed amendment replaces the reference in Rule 7007.1 to the "first pleading" filed in an adversary proceeding with a reference to the first appearance, pleading, petition, motion, response, or other request addressed to the court in the proceeding. The Advisory Committee requests that the Standing Committee approve this technical amendment without publication.

Text of these proposed amendments is also attached.

III. Information Items - Proposed Amendments to Bankruptcy Rules 1009, 4002, 5005 and 7004 and Schedule I of Official Form 6.

Rule 1009 would be amended to require the debtor to submit a corrected statement of social security number when the debtor becomes aware of an error in a previously submitted statement. The debtor would be required to give creditors notice of the corrected number.

Rule 4002 would be amended to add a new subdivision (b) to implement the directives of § 521 of the Bankruptcy Code. This proposed amendment would require that individual debtors bring to the meeting of creditors picture identification issued by a government unit, evidence of social security number(s), and certain documentation of current income, ownership of financial accounts as well as the debtor's most recently filed federal income tax return.

Rule 5005(c) would be amended to update the rule and authorize the district judge and the clerk of the bankruptcy appellate panel to transmit erroneously delivered papers to the bankruptcy clerk and the United States trustee.

Rule 7004(b)(9) and (g) would be amended to require service on the debtor's attorney whenever the debtor is served with a summons and complaint. Service on the debtor's attorney may be accomplished by any means permitted under Civil Rule 5(b). Because Rule 9014 requires that a motion initiating a contested matter be served in manner provided for service of a summons and complaint under Rule 7004, the proposed change would also apply to contested matters.

The proposed amendment to Schedule I of Official Form 6 would require that a married debtor include the income of the non-filing spouse in the statement of the debtor's income in chapter 7 cases, as is already required in chapter 12 and chapter 13 cases.

All of these proposed amendments were published in August 2004 with comments due February 15, 2005. The Advisory Committee will consider each of these proposed amendments at its next meeting in March 2005 after the comment period. If approved, the proposed amendments will be forwarded to the Standing Committee for action. Each proposed amendment is on an effective date track of 2006.

IV. Other Items

A. Joint Subcommittee on Chapter 11 Venue Issues

In March of 2004, the chairs of the Committee on the Administration of the Bankruptcy System and the Advisory Committee agreed to establish the Joint Subcommittee on Chapter 11 Venue Issues. The Joint Subcommittee is analyzing the choice of venue and other aspects of practice in large, sophisticated chapter 11 cases with the goal of developing new rules or amendments which facilitate fairness and efficiency, including access to the courts for out-of-town parties and attorneys in these cases.

The Joint Subcommittee met in August 2004 and proposed three amendments for consideration by the Advisory Committee at its meeting in September 2004. The Advisory Committee has now approved for publication a proposed amendment to Rule 1014, which clarifies the bankruptcy court's authority to transfer or dismiss cases on its own motion. The Advisory Committee approved in concept amendments to Rule 3007 (omnibus objections to claims), and to

Rule 6006 (omnibus motions to assume, reject, or assign executory contracts and unexpired leases.) The Joint Subcommittee will meet again in January 2005 to complete its work.

The Advisory Committee anticipates completing work on the proposed amendments to Rules 3007 and 6006 at its meeting in March 2005 so that all three amendments if approved by the Standing Committee can be published for comment in August 2005.

B. E-Gov Privacy Amendments

The Advisory Committee has approved in concept the proposal to create a new rule in Part IX (General Provisions) of the Bankruptcy Rules to protect privacy and security concerns relating to electronic filing and the public availability of documents filed electronically, as required by the E'Government Act of 2002 (Pub. L. 107-347). Any proposal will track the Revised Privacy Template Rule which is being developed by the E-Government Committee chaired by Judge Fitzwater (N.D. Tex.). The Advisory Committee will consider a proposed privacy rule at its meeting in March 2005, when the Advisory Committee will have the benefit of comments from the other Rules Committees which are considering similar amendments.

Any proposed rule would provide in substance that, unless a court orders otherwise, a party would be required to redact a person's social security number and tax identification numbers, the name of a minor (unless the minor is the debtor in the case or a creditor not identified as a minor), a person's date of birth, and financial account numbers. The E-Government Act and the proposed rule would permit a party to file an unredacted copy of the document under seal at the same time that the party files a redacted copy of the document. The court would be required to retain the unredacted copy as part of the court record.

Reference is made to Judge Tom Small's letter to you dated September 20, 2004, which discusses this matter.

C. Amendments Approved by Judicial Conference

At its meeting in September 2004, the Judicial Conference approved proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006(f), and Official Form 6 - Schedule G. If approved by the Supreme Court, and if Congress does not act to modify or abrogate them, the amendments will take effect on December 1, 2005.

Rule 1007 would be amended to require the debtor in a voluntary case to include the name and address of each person included or to be included on Schedules D, E, F, G, and H of the Official Forms on the list of creditors or mailing matrix filed at the start of the case. Schedule G would be amended to delete the statement that parties listed on the Schedule of executory contracts and unexpired leases will not receive notice of the case unless the parties also are listed on one of the schedules of creditors.

Rule 3004 would be amended to conform the rule to 11 U.S.C. § 501(c) and specify that the debtor or the trustee may not file a proof of claim on behalf of a creditor until the time for the creditor to file has expired. Rule 3005 would be amended to delete the reference to a creditor filing a proof of claim that supersedes a claim on behalf of the creditor by a codebtor. The proposed amendment would conform the rule to 11 U.S.C. § 501(b).

The proposed amendment to Rule 4008 would require that a reaffirmation agreement be filed within 30 days after the entry of the discharge but would leave to the discretion of the court the scheduling of any reaffirmation hearing. The proposed amendment to Rule 7004 would expressly authorize the clerk to sign, seal, and issue to the plaintiff's attorney electronically a summons which then would be printed and served with the complaint in the conventional manner. The proposed amendment to Rule 9006 would track the proposed amendment to Rule 6 of the Federal Rules of Civil Procedure. The amendments are intended to clarify the method of counting the number of days to respond after service by specifying that three days are added at the end of the period.

The Conference also approved proposed technical amendments to Official Bankruptcy Forms 16D and 17. The amended forms will be effective on December 1, 2004.

D. Rules Docket

We have also prepared a docket which describes the status of Rules considered by the Advisory Committee. Attached is the current docket.

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September 15, 2004

Honorable David F. Levi, Chair
Committee on Rules of Practice and Procedure
Chief Judge, United States District Court
501 I Street, 14th Floor
Sacramento, CA 95814

Re: Fast Track Consideration of Bankruptcy Rules Amendments

Dear Judge Levi:

Thank you for attending the meeting of the Advisory Committee on Bankruptcy Rules last week. It was a pleasure to see you, and it was especially helpful for the Committee to have the benefit of your views on the need to fast track certain proposals so that they can be promulgated more quickly and generate significant savings for the judiciary. To that end, the Advisory Committee has recommended four rules amendments for fast track consideration by the Standing Committee. Three amendments have already been published for comment, and these proposals would become effective via the fast track on December 1, 2005. The fourth amendment being recommended by the Advisory Committee for fast track consideration has not yet been published. The Advisory Committee recommends that it be published on an expedited basis so that it can become effective, if approved, on December 1, 2006.

Proposals to Become Effective on December 1, 2005

The first three amendments for fast track treatment have already been published for comment not later than February 15, 2005. The proposed amendments to Bankruptcy Rules 2002(g) and 9001(9) authorize entities and notice providers to establish the method and address for notices being sent to those entities. These amendments should facilitate electronic noticing as well as the batching of paper notices to national creditors, thereby creating a savings over the costs currently incurred by the courts. The third proposal, an amendment to Bankruptcy Rule 9036, would eliminate the need for the receipt of confirmation of an electronic notice, which currently is a prerequisite to the electronic notice being complete under the rule. This proposal is intended to encourage greater use of electronic noticing, which should also translate into savings for the judiciary.

Immediately upon the close of the comment period, our Reporter will compile the comments and distribute an appropriate memorandum to the Committee for its consideration. The Advisory Committee will act thereafter by electronic ballot on the proposals. If the Committee acts favorably on the proposed amendments, we will forward the proposals to you for consideration by the Standing Committee for its recommendation to the Judicial Conference that the proposals be approved and forwarded to the Supreme Court. We understand that the Standing Committee will take its action in time to allow the Judicial Conference to approve the recommendations and send them to the Supreme Court for final promulgation before May 1, 2005. This would allow the amendments to become effective on December 1, 2005, in the absence of Congressional action to the contrary.

Proposal to Become Effective on December 1, 2006

At last week's meeting, the Advisory Committee voted to recommend to the Standing Committee that an amendment to Bankruptcy Rule 5005(a)(2) be published for comment. The amendment would recognize the authority of the courts to adopt local rules that "permit or require" the filing of papers electronically. In the ordinary course, this recommendation, even if made to the Standing Committee at the January 2005 meeting, would result in a publication for comment of the proposal in August 2005 with the comment period expiring in February 2006. This process would lead to promulgation of an amendment that would become effective on December 1, 2007, at the earliest. Rather than follow that time line, the Advisory Committee recommends that the Standing Committee approve the amendment for publication in time to allow publication of the proposed amendment with a three month comment period ending in February 2005. The Advisory Committee could then consider the proposal at the March meeting of the Committee and could make a recommendation to the Standing Committee at its June 2005 meeting for adoption of the proposal and for forwarding of the proposed amendment to the Judicial Conference. Assuming that the proposal is acceptable, this time line would result in the promulgation of the rule by the Supreme Court in April of 2006 with an effective date of December 1, 2006. This would shorten by one year the normal track for an amendment.

Attached are copies of the amendments to Bankruptcy Rules 2002(g), 9001(9), and 9036 that have been published for public comment.

The proposed amendment to Rule 5005(a)(2) will follow under separate cover. As is our practice, the Advisory Committee's approval of the amendment is followed by our Style Subcommittee's review and possible style revision of the amendment and its Committee Note. This action will be taken next week, and as soon as the final form of the amendment is ready, I will forward it to you. The Advisory Committee recommends to the Standing Committee that it

approve the amendment to Bankruptcy Rule 5005(a)(2) and that it be published for comment with a three month comment period concluding in February 2005.

Please feel free to contact me or our Reporter, Professor Jeffrey Morris, if you have any questions regarding the Advisory Committee's actions.

Sincerely yours,

A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

Enclosures

cc: Hon. Thomas S. Zilly
John K. Rabiej
James H. Wannamaker III

RULE 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustees[1]

* * * * *

(g) ADDRESSING NOTICES

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

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

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

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

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

holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

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

(4) Notwithstanding Rule 2002(g) (1) - (3), an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice. The notice provider's failure to use the supplied address does not invalidate any notice that is otherwise effective under applicable law.

COMMITTEE NOTE

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

The business of many entities is national in scope, and technology currently exists to direct the transmission of notice (both electronically and in paper form) to those entities in an accurate and much more efficient manner than by sending individual notices to the same creditor by separate mailings. The rule authorizes an entity and a notice provider to determine the manner of the service as well as to set the address or addresses to which the notices must be sent. For example, they could agree that all notices sent by the notice provider to the entity must be sent to a single, nationwide electronic or postal address. They could also establish local or regional addresses to which notices would be sent in matters pending in specific districts. Since the entity and notice provider also can agree on the date of the commencement of service under the agreement, there is no need to set a date in the rule after which notices would have to be sent to the address or addresses that the entity establishes. Furthermore, since the entity supplies the address to the notice provider, use of that address is conclusively presumed to be proper. Nonetheless, if that address is not used, the notice still may be effective if the notice is otherwise effective under applicable law. This is the same treatment given under Rule 5003(e) to notices sent to governmental units at addresses other than those set out in that register of addresses.

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

RULE 9001. General Definitions

* * * * *

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

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

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

(12) ~~(11)~~ "United States trustee" includes an assistant United States trustee and any designee of the United States trustee.

COMMITTEE NOTE

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

Many entities conduct business on a national scale and receive vast numbers of notices in bankruptcy cases throughout the country. Those entities can agree with a notice provider to receive their notices in a form and at an address or addresses that the creditor and notice provider agree upon. There are processes currently in use that provide substantial assurance that notices are not misdirected. Any notice provider would have to demonstrate to the Administrative Office of the United States Courts that it

could provide the service in a manner that ensures the proper delivery of notice to creditors. Once the Administrative Office of the United States Courts approves the notice provider to enter into agreements with creditors, the notice provider and other entities can establish the relationship that will govern the delivery of notices in cases as provided in Rule 2002(g)(4).

RULE 9036. Notice by Electronic Transmission

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

COMMITTEE NOTE

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

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

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September 20, 2004

Honorable David F. Levi
Committee on Rules of Practice and Procedure
Chief Judge, United States District Court
501 I Street, 14th Floor
Sacramento, CA 95814-2322

Re: Privacy Template Rule

Dear Judge Levi:

As you know, the Advisory Committee on Bankruptcy Rules considered the proposed Privacy Template Rule at our meeting last week. Since we are the first of the Advisory Committees to consider the proposal, we are reporting the Committee's action to you and the Reporters of the other Advisory Committees so that they are aware of our actions prior to their meetings.

The primary substantive concern expressed by members of our Committee relates to the treatment of a minor's name. In a bankruptcy case, it is essential to have the full name of the debtor set out in the petition as well as in notices to the creditors. Consequently, the Bankruptcy Rule version of the privacy rule will have to accommodate that need. Furthermore, the Committee believes that the need to limit the identification of a minor to his or her initials does not exist when the minor is not being identified as a minor. For example, a creditor listed on the debtor's schedules would not normally be identified as a minor. In fact, the debtor may not even know that the creditor is a minor. Nonetheless, the Template would seem to require the limited identification of the minor/creditor.

A second matter that may require special treatment in the Bankruptcy Rules is the limit on the use of the social security number. Sections 110(h) and 342(c) of the Bankruptcy Code mandate the use of social security numbers by bankruptcy petition preparers and by debtors who are giving notice to a creditor, respectively. These provisions may survive the enactment of the E-Government Act and would continue to require the full social security number of petition preparers and debtors. The Committee will be studying the issue and considering it at its March meeting.

As a result of these issues, the Advisory Committee decided to reconsider the matter at its March meeting. This will also permit the Bankruptcy Rules Committee to have the benefit of comments from the other Advisory Committees. We anticipate that we will then recommend to the Standing Committee for publication a rules amendment to implement the Privacy Template Rule for bankruptcy cases. Most likely, the Bankruptcy Rule amendment will be an incorporation of the Civil Rules version of the Privacy Template Rule. If necessary, the incorporation will be limited to meet particular needs of the Bankruptcy Code and practice.

The Committee discussion also led to a suggested revision of some of the language of subdivisions (a) and (d) of the Template. That revision is attached to this letter. It is offered to the other Advisory Committees for their consideration.

We look forward to hearing about the deliberations of the other Committees on this matter. We understand the need to make the rules as consistent as practicable, and we will continue to work with the other Committees as we prepare for our March 2005 meeting.

Please do not hesitate to give me a call if you have any questions about this matter.

Sincerely yours,

A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

Enclosure

cc: Hon. Thomas S. Zilly
Prof. Patrick J. Schiltz
Prof. Edward H. Cooper
Prof. David A. Schlueter
Prof. Daniel J. Capra
Prof. Jeffrey W. Morris

Rule [ ] Privacy in Court Filings

(a) Limits on Disclosing Identifiers. Except as provided in subdivisions (b) and (d) and unless the court orders otherwise, any filing made with the court that includes the following identifiers must be limited by disclosing only these elements:

(1) the last four digits of a person's social security number and tax identification number;

(2) the initials of a minor's name;

(3) the year of a person's date of birth; and

(4) the last four digits of a financial account number.

(Subdivisions (b) and (c) would be unchanged.)

(d) Exemptions. The limits on the disclosure of identifiers provided in subdivision (a) do not apply to the following:

((1) - (4) of existing template would be unchanged)

(Subdivisions (e) and (f) would be unchanged.)

Action Items

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1014. Dismissal and Change of Venue

(a) DISMISSAL AND TRANSFER OF CASES

(1) *Cases filed in proper district.*

If a petition is filed in the proper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case ~~may be transferred~~ to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) *Cases filed in improper district.*

If a petition is filed in an improper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may

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

dismiss the case or transfer it ~~the case may be dismissed or transferred~~ to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

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COMMITTEE NOTE

Courts have generally held that they have the authority to dismiss or transfer cases on their own motion. The amendment recognizes this authority and also provides that dismissal or transfer of the case may take place only after notice and a hearing.

Rule 3007. Objections to Claims

(a) An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. ~~If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.~~

(b) A party in interest shall not include in an objection to the allowance of a claim a demand for relief of a kind specified in Rule 7001, but the objection may be included in an adversary proceeding.

COMMITTEE NOTE

The rule is amended to prohibit a party in interest from including a request for relief that requires an adversary proceeding in a claims objection. A party in interest may, however, include an objection to the allowance of a claim in an adversary proceeding. Unlike a contested matter, an adversary proceeding requires the service of a summons and complaint, thus putting the party served on notice of a potential affirmative recovery. Permitting the plaintiff in the adversary proceeding to include an objection to a claim would not unfairly surprise the defendant as might be the case if the action were brought as a contested matter that included an action to obtain relief of a kind specified in Rule 7001 from the claimant.

The rule as amended does not require that a party in interest include an objection to the allowance of a claim in an adversary proceeding. If a separate claims objection and adversary proceeding complaint are filed, nothing in the rule prevents the court from consolidating an objection to the allowance of a claim with an adversary proceeding under Rule 7042 which applies in both adversary proceedings and contested matters.

Rule 7007.1. Corporate Ownership Statement

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(b) TIME FOR FILING

A party shall file the statement required under Rule 7007.1(a) with its first ~~pleading in an adversary proceeding~~ appearance, pleading, motion, response, or other request addressed to the court. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

COMMITTEE NOTE

The rule is amended to clarify that a party must file a corporate ownership statement with its initial paper filed with the court in an adversary proceeding. The party's initial filing may be a document that is not a "pleading" as defined in Rule 7 F.R. Civ. P., which is made applicable in adversary proceedings by Rule 7007. The amendment also brings Rule 7007.1 more closely in line with Rule 7.1 F.R. Civ. P.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 9-10, 2004
Half Moon Bay, California

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
District Judge Richard A. Schell
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Bankruptcy Judge Eugene R. Wedoff, a new member of the Committee; District Judge Robert W. Gettleman, a former member of the Committee; Professor Jeffrey W. Morris, Reporter; and Ms. Patricia S. Ketchum, advisor to the Committee, attended the meeting. Circuit Judge R. Guy Cole, Jr., a member of the Committee; District Judge Ernest C. Torres, a member of the Committee; and Dean Lawrence Ponoroff, a new member of the Committee, were unable to attend.

District Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure (Standing Committee); Circuit Judge Harris L. Hartz, liaison from the Standing Committee; Peter G. McCabe, secretary of the Standing Committee; Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); and Clifford J. White, III, Deputy Director, Executive Office for United States Trustees (EOUST), attended. Professor Daniel R. Coquillette, reporter of the Standing Committee, and Lawrence A. Friedman, Director, EOUST, were unable to attend.

James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research

Division, Federal Judicial Center (FJC), also attended the meeting. Ms. Lonnie Gandara of Glen Ellen, California attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed Judge Wedoff to the Committee, and congratulated Judge Zilly on his appointment as the new chairman of the Committee. The Chairman announced that Judge McFeeley has been reappointed to the Committee and that Mr. Frank's term has been extended one year. The Chairman welcomed the members, liaisons, advisers, and guests to the meeting. The Chairman praised Professor Wiggins, whose term ends with this meeting, for her work with the Committee, including her keen eye for exact wording and punctuation. The Chairman thanked Mr. Wannamaker and the staff of the Rules Committee Support Office for the expedited production of the agenda book.

Judge Levi recognized Judge Small's service as chairman and indicated that he is looking forward to working with Judge Zilly as the new chairman.

The Committee approved the minutes of the March 2004 meeting.

The Chairman briefed the Committee on the June 2004 meeting of the Standing Committee. The Standing Committee gave its final approval to the proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006; Official Forms 16D and 17; and Schedule G of Official Form 6. The Standing Committee approved for publication the proposed amendments to Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

Judge Levi discussed the Standing Committee's consideration of the proposed amendment to Appellate Rule 35(a) (en banc determinations) and proposed new Appellate Rule 32.1 (citing judicial dispositions), which attracted hundreds of public comments. The Standing Committee gave its final approval to the proposed amendment to Rule 35(a) and returned proposed new Rule 32.1 to the Advisory Committee on Appellate Rules with a recommendation that the FJC undertake an empirical study of the impact of the citation of unpublished opinions on the courts' workload in the circuits which have authorized the practice. Judge Levi praised the contribution to the rule-making process of studies by the FJC. The Standing Committee approved for publication a package of electronic discovery rules, which Judge Levi stated presented some very difficult issues.

Judge Montali reported on the June 2004 meeting of the Bankruptcy Administration

Committee. Judge Montali stated that the Bankruptcy Administration Committee has been overwhelmed by budget issues even though it has primary responsibility for only three budget areas: temporary law clerks, recalled bankruptcy judges, and the bankruptcy administrator program. Judge Marjorie O. Rendell, the chair of the Bankruptcy Administration Committee, has written the chief judges and clerks of the bankruptcy courts requesting their advice on cost-saving ideas and suggestions for further dialogue on sharing administrative services. Judge Montali stated that the use of shared administrative services, more efficiencies in the use of recalled judges, the centralization of processing chapter 7 cases, and a higher threshold for recommending additional bankruptcy judgeships are under study. Judge Montali stated that the Bankruptcy Administration Committee is conducting its biennial study of the need for additional bankruptcy judgeships, which will include on-site surveys of six districts, and is planning a time study and re-examination of the case weights used in judgeship surveys.

Action Items

"Fast Track" Consideration of Amendments to Rules 2002, 9001, and 9036. Proposed amendments to Rules 2002, 9001, and 9036 were published for comment in August 2004. The deadline for comments is February 15, 2005. The proposed amendments to Rules 2002 and 9001 would allow creditors and notice providers to establish their own process for delivery of notices. The proposed amendments to Rule 9036 would delete the requirement that the sender of an electronic communication receive confirmation of receipt in order for the notice to be considered complete. The proposals could produce savings to the Judiciary by increasing the use of electronic noticing and thus reducing postal fees and handling costs.

If approved and promulgated in the normal course, the proposed amendments would be effective on December 1, 2006. If the Committee and the Standing Committee consider and approve the comments by e-mail ballot, the proposed amendments could be considered by the Judicial Conference at its meeting in March 2005 and transmitted to the Supreme Court prior to the May 1 deadline for the Court to transmit proposed amendments to Congress. As a result, if approved and in the absence of Congressional action to the contrary, the amendments would be effective on December 1, 2005, one year early. The Chairman stated that the Standing Committee and the Court have indicated that they are willing to consider the proposed amendments on an expedited basis, provided there is no significant opposition.

Mr. Shaffer stated that the deletion of the confirmation of receipt requirement in Rule 9036 creates an implication of a more lenient standard for the electronic service of notices than for the electronic service of pleadings and other papers under Civil Rule 5, which states that electronic service is ineffective if the party making service learns that the attempted service did not reach the person to be served. He asked whether incorporating the provision from Civil Rule 5 in the proposed amendment to Rule 9036 would require republication. The Chairman stated that it probably would be considered a substantive change which requires republication.

The Reporter stated that Civil Rule 5 only specifies that electronic service is ineffective if the sender learns that the papers did not reach the person to be served. There is no such restriction on service by mail. Judge Zilly stated that parties make service under Civil Rule 5 and the clerk serves notices under Rule 9036. The Chairman stated the Bankruptcy Noticing Center automatically sends a paper copy of the notice if it learns that an electronic notice did not reach the intended recipient. Judge Wedoff stated that he doubted that a party could prevail with an argument that an electronic notice was effective even though the intended recipient did not receive the notice. Judge Montali stated that a hearing can be rescheduled if the notice is ineffective. He noted that the time for appeal continues to run even if notice of the entry of the judgment is ineffective.

Judge Swain stated that there is a technological barrier to the use of Rule 9036 as written because email providers no longer provide confirmation of receipt. She stated that Rule 9036 is about permission to send notices electronically, not the effectiveness of those notices. Mr. Waldron stated that the Committee has been advised that electronic notices are no less reliable than first class mail. He stated that there is a risk of nondelivery with either means of transmission. Professor Resnick stated that a great deal of care went into the drafting of Rule 9036 because in 1993 it was the first electronic notice rule. He stated that in 2004 a party gives its email address to the court for electronic noticing, just as the party gives its postal address to the court for paper notices. The Committee discussed the treatment of returned emails and returned mail when notices cannot be delivered as addressed and the parties' responsibility to maintain a current address with the court. Judge Zilly stated that Civil Rule 5(b)(3)'s provision that service by electronic means is ineffective if the sender knows that the attempted service did not reach the person to be served operates in certain proceedings in bankruptcy. Civil Rule 5(b) is incorporated by Rule 7005 in adversary proceedings and by Rule 9014 for the service of subsequent papers in contested matters.

Professor Resnick said that a majority of the Committee should not be required to take the proposed amendments off the "fast track." He said that the full Committee should discuss the matter if there is a single substantive public comment. Judge Zilly stated that he would be inclined to pull the proposed amendments off the "fast track" if there is any significant dissent on the Committee to continuing the expedited treatment. Judge Zilly moved that the Committee consider the public comments on the "fast track" schedule. **With one dissent, the Committee agreed to leave the proposed amendments on the "fast track," subject to a decision by the new chairman to take the matter off the "fast track" based on public comments, concerns of Committee members, and judicial wisdom.** In an informal straw poll on the merits of the proposed amendment to Rule 9036, the Committee favored the proposal by a vote of 9-5.

Mandatory Use of Electronic Filing. The Committee on Court Administration and Case Management (Court Administration Committee) has requested that the Advisory Committees on Civil Rules and Bankruptcy Rules amend those rules to encourage electronic filing. Responding to budgetary concerns, the Court Administration Committee suggested that Civil Rule 5(e) and Bankruptcy Rule 5005(a)(2) be amended to authorize the courts to "require" the use of electronic

filing with appropriate exceptions.

The Chairman stated the proposed amendment could be effective on December 1, 2007, if published in August 2005 and considered in the normal manner. If published late this year and if considered by the Advisory Committee and the Standing Committee next spring, the proposed amendment could be considered by the Judicial Conference at its meeting in September 2005 and take effect on December 1, 2006. If published immediately and considered on an expedited basis, the proposed amendment could be effective on December 1, 2005.

Judge Zilly stated that so many courts are already requiring electronic filing that it may not be necessary to consider the proposed amendment on the "fast track." Mr. Rabiej stated that some courts are reluctant to require electronic filing because of the wording of the national rule. Judge Levi indicated that, if the proposed amendment authorizing the courts to require electronic filing on a local basis is not considered on the "fast track," an amendment may be proposed which requires electronic filing on a national basis. The Committee discussed the desirability of creating a single national standard for filing documents and that the standard be electronic filing.

One Committee member suggested publishing a supplemental Committee Note to the existing rule as an alternative to amending the rule. Professor Resnick stated that Committee Notes are published only with proposed amendments. Rule 5005(a)(1) provides that the clerk shall not refuse to accept papers for filing solely because they are not presented in proper form. Several Committee members suggested that filing a paper document in a court which mandates electronic filing may be matter of form. As a result, the filing would be subject to sanction by the judge, but the clerk could not refuse to accept the document for filing.

Judge Levi stated that the Court Administration Committee's belief that the proposed amendment would produce cost savings should be given deference. He said that, from the rules point of view, the question is whether this is a noncontroversial matter which can be dealt with quickly, or whether there are substantive issues which should be considered more fully. The Committee discussed whether the economic impact of proposed amendments or some other standard should be used to select matters for "fast track" consideration. Judge Levi said "fast track" matters usually respond to legislative changes or technical corrections. Mr. McCabe stated that in the past the Standing Committee declined to set a standard for "fast track" amendments.

Mr. Waldron said mandatory electronic filing is more efficient but that the savings have already been incorporated by reducing the staffing formula for the clerks' offices in bankruptcy courts. Several Committee members expressed concern about the impact of mandatory electronic filing on access to the court for pro se parties, out-of-district attorneys, and infrequent bankruptcy practitioners. **Judge Zilly asked staff to research existing local rules which require electronic filing.** Judge Wedoff stated that access should be addressed separately and that the question is whether the existing rule discourages courts from mandating electronic filing. Mr. McCabe stated that when courts ask about the rule, the courts are told that the current rule

was not intended to include mandatory electronic filing, but that interpretation of the rule is up to the courts.

Judge Klein moved to amend Rule 5005(a)(2) to "permit or require" documents to be filed, signed, or verified by electronic means. **Judge Klein's motion carried without dissent.** Mr. Frank suggested the Committee Note state that local rules should provide appropriate safeguards to ensure access to the court. Professor Resnick suggested that the Committee Note state that many courts have interpreted the existing rule to permit the adoption of local rules which require electronic filing and that the proposed amendment supports that interpretation. Judge Walker moved for early publication of the proposed amendment and a three-month comment period with the goal of an effective date of December 1, 2006. Judge Zilly expressed concern about whether the bench and bar would have time to respond. The Reporter stated that the proposed civil, appellate, and bankruptcy amendments would look the same and would be published as a single package, thus permitting a more focused review by the bench, bar, and public. **Judge Walker's motion carried with three dissenting votes.**

Template Rule to Protect the Privacy of Persons Identified in Court Filings. The E-Government Act of 2002 requires the promulgation of rules to protect the privacy of persons identified in court filings and to govern the availability of documents when they are filed electronically. Judge Swain discussed the development of a template privacy rule for consideration by the Bankruptcy, Civil, Criminal, and Appellate Rules Committees with the expectation that, as adopted, the rule would be as uniform as is possible. The Chairman stated that it is important to tell the other committees that the Committee will adopt the template with only minor exclusions.

The Reporter presented a draft rule which incorporated the Civil Rule version of the template with an exemption from the redaction requirement for the name of a minor who is the debtor in the case. The Reporter stated that the full name of a debtor who is a minor should be included on the petition and the caption of adversary proceedings and contested matters in the case in order to ensure that creditors are given appropriate notice. Several Committee members questioned whether the person preparing the list of creditors would know whether a creditor is a minor and how creditors who are minors would be given notice if their initials were used in place of their names on the mailing matrix. Judge McFeeley stated that the main concern was protection of the debtor's children and that the 2003 amendments to the schedules and statement of financial affairs had already taken care of that. He said there was little danger from including the names of creditors who are minors on the schedules or mailing matrix as long as the creditors are not identified as minors. The Chairman stated that because the Judicial Conference's privacy policy includes the names of minors, the names should be left in the template rule with exceptions as needed.

The statute provides that a party which makes a redacted filing may also file an unredacted document under seal. Judge Montali stated that the Committee Note should indicate that the unredacted filing is sealed automatically without requiring a motion and order to seal.

The Reporter suggested that the Bankruptcy Rules incorporate the Civil Rule version of the template rule in the rules governing adversary proceedings and that the new rule be added to the list of rules that apply in contested matters under Rule 9014. Several Committee members questioned whether that approach would cover the petition, schedules, statement of financial affairs,"first day" orders, applications to employ counsel, proofs of claim, and other case papers which are not part of an adversary proceeding or a contested matter. The Reporter stated that the new rule could be included in Part IX of the rules. Professor Resnick stated that the Bankruptcy Rules use the term "infant" instead of "minor" and suggested that the new rule do the same. Judge Levi stated that the restyled version of the Civil Rules drops the term "infant."

The Committee agreed in principle that a new rule incorporating the template rule should be included in Part IX of the Bankruptcy Rules. The new rule would provide that a minor's name be excluded from the redaction requirement when the minor is either the debtor or a creditor who is not identified as a minor. A final recommendation will be made at the March meeting after the Committee has had the benefit of comments from the other advisory committees.

Proposed Revision of the Statement of Financial Affairs. At the request of the EOUST, the Committee approved for publication an amendment to Schedule I of Official Form 6 that would require disclosure of a non-filing spouse's income in a chapter 7 case, as is already required in a chapter 12 or chapter 13 case filed by a married debtor. At its meeting in March 2004, the Committee considered briefly whether Official Form 7, the Statement of Financial Affairs, also should be amended to require information on a non-filing spouse in a chapter 7 case, as well as in a chapter 12 or chapter 13 case. The matter was referred to the Subcommittee on Forms, which recommended that the Statement of Financial Affairs not be amended.

Mr. White stated that the schedule gives the United States trustee and the trustee a snapshot of the debtor's financial affairs. He said expanding the Statement of Financial Affairs would provide historical information which would help protect the integrity of the bankruptcy system. Judge Walker, the chair of the Forms Subcommittee, stated there is no question that requiring information on a non-filing spouse would be helpful in some cases, but that it also is clear that the information would not be helpful in most cases and would be extremely intrusive. He said requiring the disclosure would be unnecessarily intrusive when other remedies exist in the cases where it is needed.

Mr. Frank stated that the disclosure did not appear to be a major issue for the integrity of the system because the EOUST did not include the proposal in the EOUST's package of amendments requiring additional disclosure. Mr. White said a number of private trustees would support the change if they knew it was being considered. He stated that the disclosure would not be intrusive in chapter 7 cases because it is already required in chapter 12 and chapter 13 cases. Judge Small asked if any Committee members wished to pursue the matter further. **There was no response and the Committee accepted the Subcommittee's recommendation not to proceed.**

Notice of Transfer of Claim. At its March 2004 meeting, the Committee considered a proposed new Director's Form entitled "Notice of Transfer of Claim" submitted by the Bankruptcy CM/ECF Working Group's claims subgroup. After a discussion, the proposed form was referred to the Forms Subcommittee. Ms. Ketchum reviewed the Subcommittee's changes to the proposed form including deleting most of the language referring to the transaction between the transferor and the transferee, rearranging the columns, and adding a statement that the notice has been filed as evidence of the transfer.

Judge Montali asked whether the notice form was intended to cover scheduled claims deemed to have been filed under section 1111(a) of the Bankruptcy Code. Professor Resnick stated that Rule 3001(e) was originally intended for chapter 11 cases and that deemed filed claims are treated as filed claims which may be transferred under Rule 3001. Ms. Ketchum agreed that including a reference to deemed filed claims is a good idea.

The Chairman stated that the proposed new form is a Director's Form, which does not require approval by the Committee. Ms. Ketchum stated that Director's Forms are submitted to the Committee for its input and suggestions. Judge Zilly stated that the proposed notice form appears to be a good step forward but expressed concern that Director's Forms are not published in some bankruptcy books. **Judge Zilly suggested that the Administrative Office explore how many Director's Forms are used on a regular basis and whether some ought to be designated as Official Forms.** Ms. Ketchum explained that the Director's Forms are available on the Judiciary's website and that many of the procedural forms have been incorporated in software used by the clerks or by bankruptcy attorneys.

Revision of the Proof of Claim. At its March 2004 meeting, the Committee considered a proposal for amending Official Form 10, the Proof of Claim, submitted by the Bankruptcy CM/ECF Working Group's claims subgroup. The Committee was sympathetic to the Working Group's goal of facilitating the electronic filing, processing, and review of claims, but identified several proposed revisions that Committee members believed would conflict with the Bankruptcy Code and Rules. The proposal was referred to the Forms Subcommittee. The Subcommittee discussed the proposal in a series of conference calls and at a meeting on September 8, 2004. In addition, the Subcommittee received additional input from the Working Group.

Judge Walker stated that one issue is whether the form should function as a matter of math with the total claim equal to the sum of the secured, priority, and unsecured amounts. After discussing whether the sum of the three components could exceed the designated total in box 1, the Subcommittee submitted a draft revision which negated the strict math function favored by some clerks and trustees. The creditor would state the amount of the claim in box 1 and complete the boxes for secured and priority claims only if a portion of the claim is secured or entitled to priority.

Judge Walker stated that the biggest discussion concerned attachments. He stated that Rule 3001 anticipates that the required supporting documents will be attached but that the current

form states that the filer should attach a summary if the supporting documents are voluminous. The electronic filing environment assumes that there is some limitation on the size of the attachments because large attachments can slow down the operation of the CM/ECF system, and they take longer to file or to call up on a computer. Judge Walker said there was lots of sentiment on the Subcommittee to increase the 10-page limit on attachments suggested by the Working Group, but uncertainty about the proper limit. **The Subcommittee left the page limit blank on the draft revision and asked for guidance from the CM/ECF project staff on the page limit.**

Judge Zilly stated that Rule 3001(c) requires that, if a claim is based on a writing, the writing shall be filed and that Rule 3001(d) requires that evidence of perfection of a security interest be filed, but that filing relevant excerpts may make more sense in the electronic world than filing the entire documents. Mr. Shaffer stated that the proof of claim is not just an opening salvo and that it would better to either divide the attachments into a number of documents or to require the filer to make copies of the complete documents available on request. Mr. Waldron said a number of courts require that lengthy attachments be divided into segments but that multiple documents still impact CM/ECF system performance by increasing the size of the database and slowing network traffic. Judge Wedoff stated that documents which included thousands of pages were divided into 50-page segments in the United Airlines case and that it was little different from filing lengthy paper documents, which could clog up the clerk's office, too. He stated that it is just a matter of getting bigger computers and more bandwidth.

Judge Walker stated that limiting the size of documents is a matter of controlling the use of resources. Judge Walker stated that, if one arm of the Judiciary says the limitations are important, that should be given some deference. Judge Montali stated that, with the exception of a few mega cases, most proofs of claim are only four to five pages long. **Judge Walker said the Subcommittee hoped to have a final draft ready for the March 2005 meeting and invited the Committee members' input.**

Joinder of Objections to Claims with a Demand for Rule 7001 Relief. The Committee considered a possible amendment to Rule 3007 at its March 2004 meeting. The existing rule attempts to provide a procedural framework for situations in which the parties join a request for relief that should have been brought as an adversary proceeding with an objection to claim. The rule provides simply that the hybrid objection is deemed to be an adversary proceeding without addressing the consequences of the characterization. The Committee referred the matter to the Subcommittee on Attorney Conduct and Health Care. The Subcommittee met by teleconference in late April and recommended an amendment which prohibited joining a demand for Rule 7001 relief with an objection to claim. The proposed Committee Note stated that the two may be joined by filing an adversary proceeding.

Judge Montali asked whether the existing rule is a problem. Judge Klein said the existing rule creates difficulties for clerks because it leaves so many procedural questions unanswered, including just how the transformation to an adversary proceeding takes place. It is unclear

whether the person requesting Rule 7001 relief must pay a filing fee, serve the demand for relief with a summons, or repeat anything done earlier. Judge Montali stated that the proposed amendment creates an unnecessary obstacle by requiring a separate adversary proceeding. Instead of an absolute bar, he suggested allowing the party to join the objection and demand for relief and stating in the Committee Note that a filing fee is required. The Reporter said the Subcommittee found it easier to separate the two concepts than to specify how the deemed adversary proceeding would be treated.

Professor Resnick suggested stating that a party may join the objection and demand for relief by commencing an adversary proceeding. Judge Wedoff suggested adding "but an objection to claim may be included in an adversary proceeding" at the end of the Subcommittee's draft. Professor Resnick suggested substituting "with' for "to" in line 9. Mr. Frank suggested inserting "If a party files a separate adversary proceeding," at the beginning of the third paragraph of the Committee Note. Professor Resnick suggested deleting the second paragraph of the Committee Note. He suggested replacing "matter" with "proceeding" in the second line of the first paragraph of the Committee Note and inserting "or for other relief specified in Rule 7001" after "claimant" in the penultimate line of the paragraph. **With no dissenting votes, the Committee approved the proposed amendment for publication with the revisions suggested by Professor Resnick, Judge Wedoff, and Mr. Frank.**

Effect of 2003 Amendments to Civil Rule 23. Professor Resnick stated that Civil Rule 23 was amended effective December 1, 2003, to add new subdivisions (g) and (h). Rule 23(h) establishes new procedures for the award of attorney fees in class actions and states that Civil Rule 54(d) applies to awards of attorney fees in class actions. Bankruptcy Rule 7023 applies all of Civil Rule 23 in adversary proceedings. Therefore, it appears that new Rule 23(h) applies in adversary proceedings. Bankruptcy Rule 7054(a) applies Civil Rule 54(a)-(c) in adversary proceedings, but not Civil Rule 54(d). At its meeting in March 2004, the Committee discussed whether Bankruptcy Rule 7023 or Rule 7054 should be amended to address the amendment of Civil Rule 23.

The Chairman referred the matter to the Subcommittee on Business Issues, which voted 5-1 to recommend that no changes be made to the Bankruptcy Rules at this time with respect to the application of Civil Rule 54(d) in class action adversary proceedings. The reasons for the recommendation included the rarity of class actions in bankruptcy, concern about raising complex and controversial issues relating to the use of special masters and magistrate judges in bankruptcy proceedings, and the desire not to deal with the complex issue of attorney fees in bankruptcy in the context of class actions only. Professor Resnick suggested that the Committee defer action and see what develops in the case law. Judge Montali suggested carving out references to magistrate judges and special masters in Rule 23(h)(4). Professor Resnick stated that doing so could be a lightning rod for controversy. **The Committee agreed not to amend Rules 7023 or 7054 at this time.**

Limiting the Application of Rule 7026 in Adversary Proceedings. As a result of the

Committee's discussion of the possibility of exempting specific categories of adversary proceedings from the operation of the mandatory disclosure requirements of Civil Rule 26, Mr. Niemic conducted a study of the use of mandatory disclosure in adversary proceedings. The survey demonstrated that the views of the bankruptcy judges were quite mixed. The Committee discussed the study at its March 2004 meeting and referred the matter to the Subcommittee on Privacy, Public Access, and Appeals. Mr. Adelman, the chair of the subcommittee, stated that the Subcommittee recommended doing nothing because there was no real consensus on which categories of proceedings to exclude and because the parties can stipulate that the "mandatory" disclosures will not be required.

The issue was discussed at the roundtable meeting of bankruptcy judges held in conjunction with an FJC seminar held in Seattle in August 2004. The consensus of the judges was that the system is working and should not be changed. Another sentiment expressed was that amending the rule would highlight that the "mandatory" disclosures are not made in many proceedings. Judge Klein stated that Rule 7026 requires the disclosures but nobody complies. Judge Zilly stated that the rule allows the parties to stipulate that the disclosures are not needed and that is what the parties are doing, explicitly or implicitly. **The Committee agreed not to amend Rule 7026.**

Retroactive Extension of the Deadline to Object to Exemptions. Judge Wedoff has requested that the Committee consider an amendment to Rule 4003(b) to allow the retroactive extension of the time to object to claims of exemptions in certain circumstances. Judge Wedoff suggested that late objections be permitted when there is no good faith basis for the debtor's claim of exemptions and for secured creditors when the debtor files a lien avoidance under section 522(f)(1) of the Bankruptcy Code. Judge Walker suggested that the standard should be whether the debtor had no reasonable basis for the claim of exemptions. Judge Montali suggested specifically requiring that the objection be filed before the case is closed.

Mr. Frank expressed concern about the amendment's effect on finality and questioned whether a change is needed. He stated that the possibility of a bankruptcy fraud prosecution or Rule 9011 sanctions keeps debtors from getting a free ride to file false claims of exemption. Judge Walker stated that there is little chance of prosecution for this. Several Committee members discussed the use of the good faith standard. Professor Resnick suggested that the standard be whether the debtor knowingly and intentionally made a false claim of exemptions. Judge Montali suggested using the "knowingly and fraudulently" standard in section 727(a)(4) of the Code. Instead of extending the objection period, Judge Hartz suggested using equitable estoppel with the time to object running from when there were reasonable grounds to object.

Judge Klein stated that the same change would be needed in a number of rules with parallel construction and that creditors have standing to object and should be charged with protecting their own interests. Judge Montali stated that the proposed amendment was an effort to override Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), in which the Court held that a trustee who failed to object timely to the debtor's claim of exemptions was barred from raising

the issue outside of that deadline. He said Taylor required the trustee to do the trustee's job. Judge Wedoff said Taylor enforced the rule and the amendment is an effort to say what the rule should be on the basis of Rule 9011. Professor Resnick said that focuses on the culpability of the actor, and the facts on which the actor believed he was entitled to the exemption. **The Committee agreed to refer the issue to the Subcommittee on Consumer Matters.**

Separate Document Requirement for Judgments. Bankruptcy Rule 9021 requires that a judgment entered in an adversary proceeding or a contested matter be set forth in a separate document, which is comparable to the separate document requirement in Civil Rule 58. Rule 9021 states that a judgment is effective when entered as provided in Rule 5003. Civil Rule 58 applies in bankruptcy cases except as otherwise provided in Rule 9021. Civil Rule 58(b) states that if a separate document is required, the judgment is entered when the separate document is entered on the docket and when the earlier of two events occurs: the judgment is set forth in a separate document or 150 days has run from the entry on the docket.

The Chairman stated that there is a question whether a judgment is effective when the judge rules from the bench and directs a party to prepare the order or when the formal judgment is entered. Just as attorneys may ignore the mandatory disclosure requirements in Civil Rule 26, judges sometimes ignore the separate document requirement. The Reporter stated that, in many contested matters, the order is set out in a docket entry and there is no separate document. Judge Klein said the 150-day limit applies to any appealable order in an adversary proceeding or contested matter unless it is set out in a separate document. Because there may be a question about the application of the 150-day alternative in bankruptcy cases, the Reporter suggested revising Rule 9021 either to delete the separate document requirement or to clarify the application of Rule 58 by only incorporating the provisions of subparts (a), (c), and (d) of the Civil Rule. **The Chairman referred the matter to the Subcommittee on Privacy, Public Access, and Appeals for further study.**

Debtor-in-Possession Duties under Rule 1019(5)(A). R. Bradford Leggett, an attorney in North Carolina, requested that the Committee consider amending Rule 1019(5)(A), which requires a post-conversion report by a former debtor-in-possession. Mr. Leggett stated that the conversion to chapter 7 terminates the debtor's status as a debtor-in-possession. The Chairman said the courts require the former DIP to prepare the report but that the real problem is that the attorney for the DIP is not paid for preparing the report. The Chairman asked whether the problem was serious enough to change the rule. Mr. Adelman said he considered preparing the report part of the cost of doing business as counsel to the former DIP and that the attorney should have access to the information needed for the report.

Judge Klein asked whether the attorney for the former DIP could be retained as special counsel to the chapter 7 trustee under section 327(e) of the Bankruptcy Code to prepare the post-conversion report. The Chairman said a bankruptcy court denied Mr. Leggett's request to be designated as special counsel on the basis of the Supreme Court's holding in Lamie v. U.S. Trustee, 124 S.Ct. 1023 (2004). The Supreme Court held in Lamie that the chapter 7 debtor's

counsel could not be paid out of the estate because section 330(a)(1) does not authorize payment of fees to the debtor's counsel in chapter 7 cases. Relying on Rule 1019(5)(A) and Lamie, the bankruptcy court held that preparing the post-conversion report is the DIP's obligation, not the trustee's.

Judge Klein suggested incorporating in Rule 1019(5)(A) the concept of Rule 1007(k), which governs the preparation of lists, schedules, and statements on the debtor's default. Under Rule 1007(k), the court may order the trustee, a petitioning creditor, committee, or other party to prepare any of these papers and be reimbursed from the estate as an administrative expense. Professor Resnick stated that it would cost more to prepare an application for retention under section 327(e) than it would cost to prepare the post-conversion report. Judge Walker asked if the rule was "broken" and moved that the Committee take no action. **With no dissenting votes, the Committee agreed to take no action.**

Time for Filing Corporate Ownership Statements under Rule 7007.1. The current version of Rule 7007.1 requires that any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, file a corporate ownership statement with its first pleading in the adversary proceeding. The first filing by a defendant in an adversary proceeding may not be a "pleading," as that term is defined in Civil Rule 7, which is applied in adversary proceedings by Bankruptcy Rule 7007. The Reporter suggested that Rule 7007.1 be amended to require filing the ownership statement with the party's "first appearance, pleading, petition, motion, response, or other request addressed to the court."

Judge Montali suggested requiring the statement with the party's first filing. Professor Resnick stated that electronic filings are considered papers under Rule 5005(a). Judge Klein suggested incorporating Rule 7007.1 in Rule 1018. The Reporter suggesting incorporating it in Rule 1010, instead. The Reporter stated that Rule 7007.1 is about recusal and should be applied only where recusal is possible. He said the corporate ownership statement is required in adversary proceedings under Rule 7007.1 and in voluntary petitions under Rule 1007, but not in involuntary petitions or contested matters. Judge Klein moved to use the language of Civil Rule 7.1 in the proposed amendment to Rule 7007.1 and to amend rule 1010 to require the corporate ownership statement when an involuntary petition is filed. **The motion carried with one dissenting vote. The proposed amendment to Rule 7007.1 will be submitted to the Standing Committee with a request that it be approved without publication as a conforming or technical amendment.** An amendment to Rule 1010 will require publication.

Joint Subcommittee on Venue and Mega-Cases. The Joint Subcommittee on Venue and Mega Cases (Joint Subcommittee) is composed of members of the Committee and members of the Bankruptcy Administration Committee. The Subcommittee, which is chaired by Mr. Shaffer, held its first meeting in Seattle in August 2004. Mr. Shaffer stated that the Joint Subcommittee hopes to make the system fairer and more efficient for mega cases. Mr. Shaffer outlined a four-prong effort to improve the system by (1) amending the rules to specifically authorize sua sponte venue changes, (2) making the rest of the country more user friendly for large chapter 11 cases

like the handful of districts which receive the majority of these cases now, (3) recognizing that the large chapter 11 practice is a national practice and making the system work better for out-of-town creditors and attorneys, and (4) identifying the real problems that cannot be solved in the rules context and providing guidance to the judges on these matters.

Rule 1014: Although legislation has been proposed to authorize sua sponte motions to transfer venue, Mr. Shaffer stated that he believed this could be accomplished by amending Rule 1014. Judge Zilly stated that a civil action in the district court can be transferred under section 1404 of title 28 only to a district where the action could have been filed and asked whether the transfer of a bankruptcy case or proceeding under section 1412 is subject to the same limitation. Judge Montali stated that section 1412 provides for the transfer of a bankruptcy case or proceeding to a district in the interest of justice or for the convenience of the parties. Mr. Adelman asked whether the rules amendment went beyond scope of section 105 of the Bankruptcy Code, which refers to carrying out the provisions of title 11, not the provisions of title 28. Professor Resnick stated that the rule provides who may make the motion, which is procedural.

Judge Wedoff said he had no opposition to the amendment because bankruptcy judges either already have the power to transfer cases sua sponte or the amendment gives the judges more discretion. Judge Walker stated that a specific reference in Rule 1014 to sua sponte motions could imply that the court cannot act on its own motion in other instances. Professor Resnick stated that he was not concerned about the inference. He said Rule 1017 refers to dismissal under section 707(b) on motion by the United States trustee or on the court's own motion. Professor Resnick stated that a party in interest must make a timely motion but that the court could act at any time. Judge Swain stated that the court is acting in the interest of justice and should have the broadest interpretation of time.

Professor Resnick suggested reversing the phrases so that the amendment would refer to a timely motion of a party in interest or on the court's own motion. **The Committee agreed.** Judge Klein stated that the Committee Note should state that the amendment clarifies that the court may act sua sponte, rather than it provides that authority. **The Committee agreed. Mr. Adelman's motion to approve the amendment for publication was approved without dissent.**

Rule 3007: Mr. Shaffer stated that the proposed amendment to Rule 3007 would provide needed guidance to the courts. He said there is concern about the practice in at least one district of permitting omnibus objections to claims on the merits. Judge Montali stated that disallowing a claim is substantive but that proposed Rule 3007(c) draws a distinction based on whether the objection goes to the merits. He stated that the question is whether these types of objections can be lumped together without going to the merits. Professor Resnick asked what is wrong with joining objections to claims on any grounds, including substantive grounds. Professor Morris stated that the nature of the defenses and the ease of resolving the objections differ, depending on whether the objections are substantive.

The Chairman stated that proposed Rule 3007(c) would permit the objections to claims listed in that subsection to be joined without court approval, but that court approval would be needed to join the objections to claims listed in proposed Rule 3007(b). Judge Zilly suggested that the Committee Note state that Rule 3007(c) is intended to cover objections to claims which do not go to the merits. Judge Wedoff stated that the lack of supporting documents is not a basis for the invalidity of a claim under section 502 of the Code. Professor Resnick suggested striking section 3007(c)(7). Professor Resnick stated that the references in lines 9-10 and lines 13-14 to "objections to claims held by more than one claimant" would include individual objections to joint claims. **The Committee agreed to change the references to "objections to more than one claim."**

Judge Walker stated that the proposed rule is really guidance for better practices and that it would be better to prepare a manual than to try to develop a rule acceptable to everybody. Judge Montali responded that a revised edition of the megacase manual and other resources for judges are planned. The Chairman stated that proposed Rule 3007(d) incorporates both best practices and due process. Judge Klein stated that creditors may have difficulty finding their claims in the omnibus objections that are being filed now. He stated that the claims may not be listed in alphabetical order and that a claim may be included in multiple categories of objections. Mr. Shaffer said the debtor in the United Airlines case included page references to creditors in its omnibus objections. Mr. Adelman said the complexity of the omnibus objections to claims in the K-Mart case prompted more objections.

Professor Wiggins stated that the text to be deleted from Rule 3007 should be set out in the draft. **The Committee agreed.** Judge Klein suggested that the Committee Note state that the amendment is an exception to the Restatement on finality for appeal. **A motion for the Reporter to present a final draft of the proposed amendment at the March meeting carried without dissent.**

Rule 6006: Mr. Shaffer stated that the proposed amendment to Rule 6006 concerning omnibus assumption, rejection, or assignment of executory contracts and unexpired leases parallels the proposed amendment for omnibus objections to claims. The proposed amendment permits omnibus motions to reject but requires permission from the court for omnibus motions to assume or assign. Professor Resnick suggested that line 2 be revised to refer to "requests for court approval." He stated that motions to assume should not be combined in an omnibus motion without court permission unless the executory contracts or unexpired leases are held by the same party. Judge Swain suggested adding a provision that the motions could be combined if the contracts and leases are held by the same party.

Judge Zilly asked why no more than 100 executory contracts and unexpired leases was chosen as the maximum that could be combined. Judge Montali said the limit changed several times in earlier drafts and that the number is arbitrary in a sense. Mr. Shaffer asked whether the rule should permit some motions to assume or assign to be combined without court permission, perhaps if the contracts or leases arose in the same transaction. Professor Resnick suggested a

carve out for assumptions and assignments as part of a sale under section 363 of the Code. **The Committee agreed to combining assumptions and assignments in a section 363 sale provided that the omnibus motion is subject to proposed Rule 6006(f).**

Professor Resnick stated that the proposed amendment should deal with the assumption or assignment of contracts and leases in a plan. Judge Montali stated that Rule 6007(a) excludes plans. He stated that plans should be required to follow a "user friendly" approach to omnibus assumptions. **The Committee agreed that there should be a provision for omnibus assumption or assignment in plans but not in Rule 6006.** Judge Klein suggested renumbering sections (e) and (f) as sections (c) and (d). Mr. Shaffer stated that renumbering could cause problems with research. Professor Resnick suggested breaking section (e) into sections (e)(1) and (e)(2). Professor Wiggins suggested either deleting the word "other" in line 27 or making the wording of proposed Rule 6006(g) parallel with that of proposed Rule 3007(e). **A motion to approve the proposal in concept with a provision for the combination of related assumptions and assignments carried without dissent.**

First Day Orders: Mr. Shaffer stated that the Joint Subcommittee would make recommendations at the March meeting on what can be done on the first day of a chapter 11 case. He said the concept is similar to the interim approval of compensation for professionals, *i.e.,* that you can not bind the world forever on the first day. He said that, absent a clear showing of an emergency, the estate should not be bound by major expenditures, obligations, and waivers before the creditors' committee is organized and creditors have a chance to evaluate what is going on. Judge Wedoff stated that critical vendor payments in the United Airlines case were made on an interim basis subject to disgorgement.

Mr. Adelman stated that the provision in Rule 4001(b) for the emergency use of cash collateral for 15 days before the hearing is a perfect solution for limiting first day orders. The Chairman stated that the process should be slowed down because first day orders often are unfair to underfinanced debtors, to creditors who do not have time to review lengthy proposals, and to the court. The Committee discussed interim approval of the employment of counsel and interim payments while the court and creditors review the applicant's disclosures for possible conflicts. Judge Montali stated that it is fair to say the professional takes the risk but it may not be fair to say the professional knows the risk. Mr. Shaffer stated that waiting 15 days to review the application is not unfair and that the proposed rule may not have to provide one way or the other on disgorgement. He stated that the proposed rule would cover transactions outside the normal course of business under sections 362, 363, 364, and 365 of the Code. The Chair suggested adding waivers under section 506(c). **Mr. Shaffer stated that the Joint Subcommittee would address the issue at its meeting in January and will present a draft rule at the March meeting.**

Case Information and Pro Hac Vice: Mr. Shaffer stated that the Joint Subcommittee is also considering how to encourage the courts to post relevant information on their websites, such as a summary of the case prepared by the debtor, case management orders, calendars, notice lists,

and the like.

Mr. Adelman stated that the Joint Subcommittee is considering the feasibility of a national rule for pro hac vice admission of attorneys, especially for claims allowance and preference actions. The Subcommittee may start by developing ideas for the use of CM/ECF, teleconferences, video conferences, and limited appearances. Judge Keeley stated that requiring local counsel had been very valuable to her court. She stated that the jurisdiction of the bankruptcy rules may be challenged if the rules do not require local counsel and that the provision could reduce the fees collected for pro hac vice admission. Mr. Adelman stated that the Subcommittee was not trying to affect those fees. Judge Keeley said requiring local counsel familiar with the judges and local procedures is especially important in a small court where out-of-state attorneys appear infrequently and the court has limited control over their conduct. In addition, if the out-of-state attorney drops out of the case, the local attorney continues to represent the party.

Judge McFeeley stated that the court can sanction out-of-state attorneys but that referring disciplinary matters to an out-of-state bar may be ineffective. Mr. Adelman said Judge Rendell had suggested that out-of-state attorneys be required to consent to discipline by the local bar and to pay a fee for pro hac vice admission. Judge Schell stated that his court does not require local counsel but does require out-of-state attorneys to read the local rules and standards of practice. **Mr. Adelman stated that the Subcommittee hopes to present a more full treatment of the issues at the next meeting.**

Information Items

Extending the Appeal Time. Judge McFeeley suggested that the time for filing a notice of appeal be extended. The existing 10-day period runs from the entry of the judgment but the parties may have only six days to act because it takes two days to process the notice of the entry at the Bankruptcy Noticing Center and another two days for the notice to arrive by mail. The Reporter stated that the Committee could extend the time for appeal, change the rule to run the time for appeal from service of the notice, or change the way time is computed under Rule 9006.

Professor Resnick stated that a party could monitor the electronic docket to determine when the judgment is entered. Judge Walker stated that is a problem for pro se parties. Professor Resnick outlined the history of efforts to standardize the computation of time in the federal rules. Mr. McCabe stated that Judge Edward Leavy, the former chair of the Committee, had proposed that all the federal rules use multiples of seven days. Judge Montali stated that many courts mail notice of the entry themselves or direct the prevailing party to do so, rather than relying on the BNC to serve the notice. Judge Klein stated that the 10-day appeal period is unique in federal practice and is a barrier to entering bankruptcy practice. Judge Walker stated that the short time for appeal and the delay at the BNC reinforce the perception that a small core of attorneys are the exclusive users of the bankruptcy system. Judge Klein suggested considering

permitting the time for appeal to be reopened retroactively, as is done under Appellate Rule 4. **The issue was referred to the Subcommittee on Technology.**

National Rules for Electronic Filing. The Chairman stated that the Judicial Conference has adopted model rules for electronic filing, which the courts can follow or not. He asked whether the Committee should start considering national rules for electronic filing now or wait for further technical developments and for the development of best practices in the courts. He said the Committee should not start too early but that it takes a long time to adopt rules. Judge Wedoff stated that many large courts are just starting electronic filing and suggested waiting a little more time. Judge Zilly stated that the courts with mandatory electronic filing are just working through the glitches in their local rules. **The Committee agreed to wait in order to have the experience of more courts. The matter will remain on the agenda for consideration in the future.**

Cross Reference to Rule 4004 in Rule 9006(b)(3). The Committee discussed whether a cross reference to Rule 4004(b) should be added to Rule 9006(b)(3) or whether the existing cross reference to Rule 4004(a) should be broadened to cover Rule 4004 generally. Mr. Frank asked if the issue had ever arisen in a case. **The Committee agreed to defer the matter until such time as more substantive changes to Rule 9006 are considered.**

Servicemembers Relief Act. Judge Joan Feeney asked whether the Committee is considering proposing national rules to implement the Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-117. **There was no sentiment to pursue a national rule at this time.**

After-the-Fact Extensions of Time to File Proofs of Claim. The Committee discussed Judge Dennis Michael Lynn's suggestion to amend Rule 9006 to make after-the-fact extensions of time to file a claim under Rule 3004 or Rule 3005 more in line with the extension of time to file a claim under Rule 3002 or Rule 3003. **The Committee agreed to defer consideration of the change to such time as more substantive changes to Rule 9006 are considered.**

Revision of Final Decree. Mr. Wannamaker stated that the Director's Procedural Form entitled "Final Decree" includes a provision cancelling the trustee's bond. At the time the form was developed, many trustees had a separate bond for each case and the bond was cancelled when the case was closed. Most trustees now use "blanket" bonds which cover all of their cases. The provision is no longer needed in the Final Decree because the trustee's "blanket" bond continues in effect for other cases. **No action was required by the Committee.**

Other Information Matters. The other Information Items are set out in the agenda materials for the meeting.

Administrative Matters

Judge Zilly, the new chairman, stated that he intends to continue the existing

subcommittees with Judge McFeeley taking his position as chair of the Technology and Cross Border Insolvency Subcommittee. Judge Swain would replace Judge Zilly on the Subcommittee on Business Issues and Judge Wedoff would replace Professor Wiggins on the Subcommittee on Consumer Issues. Judge Zilly asked Committee Members to contact him within 10 days if they would like to change their subcommittee assignments. Judge Small praised the new chairman and the subcommittee chairs. Judge Small stated that he is leaving the Committee with a good feeling about what the Committee is doing and where it is going.

The Committee's next scheduled meeting will be at the Sarasota Hyatt Hotel, Sarasota, FL, on March 10-11, 2005. Judge Zilly discussed several locations as possible sites of the fall 2005, meeting, including Jackson Hole, WY, Santa Fe, NM, and Lake Tahoe, CA/NV. September 15-16 and September 29-30 are the most likely dates.

Respectfully submitted,

James H. Wannamaker, III

Bankruptcy Rules Tracking Docket (By Rule Number) 11/16/04

Approved Items - No Further Action by Committee Necessary

Suggestion	Track
Rule 1007 Debtor to include matrix name/address persons for schedules D-H	12/1/05
Schedule G Amend to delete statement re notice	12/1/05
Rule 1011 Technical amendment to conform to Rule 1004	12/1/04
Rule 2002(j) Technical amendment to correct reference to IRS	12/1/04
Rule 3004 Debtor or trustee may not file proof of claim until creditor time expires	12/1/05
Rule 3005 Conform to code	12/1/05
Rule 4008 Reaffirmation agreement to be filed within 30 days of discharge	12/1/05
Rule 7004 Clerk sign, seal summons electronically	12/1/05
Rule 9006(f) Additional time after service by mail	12/1/05
Rule 9014 Opt out of mandatory discovery provisions of Rule 7026 for contested matters	12/1/04
Official Forms 16D and 17 Technical changes	12/1/04

Active Items

Suggestion	Docket No., Source & Date	Status Pending Further Action	Track
Rule 1009 Social security number - amended statement		4/04 - Committee approval 6/04 - Standing Committee affirm 8/04 - Published for public comment	12/1/06
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 _____ 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered 9/03 - Committee considered and approved in principle 3/04 - Committee approved for publication 6/04 - Standing committee approved for publication 8/04 - Published for public comment	12/1/05
Rule 3007 Procedure for objection to claim - no affirmative relief at same time		9/04 - Committee approval to be sent to Standing Committee tentative publish date 05	12/1/07
Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment	12/1/06

Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Reviewed by Committee - Tab 11 11/04 - Referred to Consumer Subcommittee for study	
Rule 5005(a)(2) Permit or require electronic filing	04-BK-D Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 11/04 - Publication (3 month period) Fast Track	12/1/06
Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel to entities already listed	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee considered and approved for publication 1/04 - Standing Committee approved for publication 8/04 - Published for Public Comment	12/1/06
Rule 6004(a) and 2002(c)(1) Sale of property	9/04 letter from Judge Vincent Zurzolo	10/04 - referred to reporter for review	
Rule 7007.1 Corporate ownership statement with initial filing suggestion		9/04 - Committee approval technical amendment no publish No publication necessary	12/1/05
Rule 7004(b)(9) and (g) Service summons and complaint on attorney for debtor	Committee proposal will be sent to Standing Committee	8/04 - Published for public comment	12/1/06
Rule 8002(a) Extending the appeal time	Committee proposal	8/04 - Referred to Committee 9/04 - Tab 16 Committee Notebook 10/04 - Referred to Technology Subcommittee for study	

Rule 9001 Notice provider definition	Committee proposal	3/04 - Committee approval 6/06 - Standing Committee approval 8/04 - Published for public comment	12/1/05
Rule 9021 Separate Document Requirement	Letter from Judge David Adams	8/04 - Referred to Committee 9/04 - Committee Review - Tab 12 11/04 - Referred to Privacy, Public Access and Appeals Subcommittee for study	
Rule 9036 Notice by electronic means is complete upon transmission	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02 2005 or for 2006	2/02 - Referred to reporter, chair and committee 9/03 - Committee considered and approved in principle 1/04 - Standing Committee approved for publication 8/04 - Published for public comment Fast Track	12/1/05
Schedule I to Form 6 Income of non-filing spouse disclosure	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment	12/1/05
Official Form B10 Amend Proof of Claim form. (May affect Rule 3001)	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair and Subcommittee on Forms 11/04 - Referred to Form Subcommittee	

Inactive Items / Historical Information

Suggestion	Docket No., Source & Date	Status
Rule 1019(5)(A) Deal with "nonexistence" of debtor-in-possession	04-BK-C R. Bradford Leggett, Esq. 5/21/04	5/04 - Referred to chair and reporter 9/04 - Tab 13 Discussed by Committee - Vote to take no action

Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 4/04 - Tabled motion carried
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **NO FURTHER ACTION REQUIRED**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **NO FURTHER ACTION REQUIRED**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **NO FURTHER ACTION REQUIRED**
Rule 7001 dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and referred to Attorney Conduct Subcommittee **NO FURTHER ACTION REQUIRED**
Rule 7023.1 Eliminate rule extension number	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **NO FURTHER ACTION REQUIRED**

Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01/BK-A Jay L. Welford, Esq. And Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **NO FURTHER ACTION REQUIRED**
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK-005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee 9/04 - Committee defers action **FURTHER ACTION MAY BE APPROPRIATE**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **NO FURTHER ACTION**
Official Form 1 Amend Exhibit C to the Voluntary Petition	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee
New Rule Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed Rule 5.1
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **NO FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **NO FURTHER ACTION**

Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION** **DENIED**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **NO FURTHER ACTION**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **NO FURTHER ACTION**