COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2003
Philadelphia, Pennsylvania
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Philadelphia, Pennsylvania, on Monday and Tuesday, June 9 and 10, 2003. The following members were present:

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

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Jeffrey A. Hennemuth, Deputy Assistant Director for Judges Programs, 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 Kathryn Marrone, senior attorneys in Office of Judges Programs of the Administrative Office; Ned Diver, law clerk to Judge Scirica; Joe Cecil of the Research Division of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, Jr., consultant 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 David F. Levi, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Judge David G. Trager
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 were E. Norman Veasey, Chief Justice of Delaware, Howard Bashman, Esq., and Professor Francis E. McGovern of Duke University Law School.

INTRODUCTORY REMARKS

Judge Scirica congratulated Mark Kravitz on his pending appointment as a United States district judge for the District of Connecticut. He also noted, with regret, that Judge Tashima's term on the committee was about to expire. He thanked Judge Tashima for six years of invaluable service and emphasized that Judge Tashima is one of the outstanding appellate judges in the country.

Judge Scirica also mentioned the impending completion of his own term as chairman of the committee. He thanked the members for their great support and for honoring him with a dinner. He emphasized the great professional and personal enrichment that he had received from his work with the committee. In particular, he pointed to the astonishing work of the reporters to the rules committees and noted that they are the best in their respective fields. Judge Scirica observed that the reporters approach their work as a labor of love and enjoy the gratitude of everyone involved in the rules process.

Judge Scirica explained that Peter McCabe, the committee's secretary, was unable to attend the meeting because he was undergoing back surgery. He expressed the committee's best wishes for a speedy recovery.

Judge Scirica reported that the Supreme Court in March 2003 had adopted all the proposed rule amendments recommended by the Judicial Conference in September 2002. He added that the Court had transmitted the amendments to Congress, and — unless Congress acts on them — they will take effect on December 1, 2003.

Judge Scirica pointed out that the revisions include three important changes in the Federal Rules of Civil Procedure. The amendments to Rule 51 (jury instructions) would explicitly recognize the authority of a judge to require submission of proposed jury instructions before trial. They also make it clear that to preserve a claim for error on appeal the proposing party must both: (1) request the proposed jury instruction; and (2) object to the court's failure to give the instruction.

He said that the extensive revision of Rule 53 (special masters) would modernize the rule and recognize the current practices of the district courts in using masters, including performance by masters of pretrial and post-trial functions. He noted that the rule, as amended, would establish a framework for the appointment of masters, the conduct of proceedings before masters, and the review of masters' decisions by the district court.

Judge Scirica pointed out that some concern had been expressed that masters have been used by some courts in inappropriate cases. The revised rule, he said, specifies that a master may be appointed only to "address matters that cannot be addressed timely and effectively by an available district judge or magistrate judge of the district." In addition, he noted, the revised rule strengthens the control of the Article III court and departs from the "clearly erroneous" standard of review in the current rule. In the future, a court will have to decide "de novo" all objections to a master's findings of fact — unless the parties stipulate, and the court consents, that the master's findings will be reviewed only for "clear error" (or in some cases that the findings will be final).

He said that the proposed amendments to Rule 23 (class actions) focus on class-action procedures, rather than class action certification standards. The amendments, he noted, are designed to give district judges the tools, authority, and discretion to supervise class-action litigation closely. He explained that the amendments concentrate on five areas: (1) judicial oversight of settlements; (2) timing of the certification decision; (3) notice; (4) attorney appointments; and (5) attorney compensation. The most significant amendment, he noted, would — in appropriate cases at the discretion of the trial judge — give class-action members an opportunity for a second "opt-out" once the terms of a settlement are known.

Judge Scirica noted that the proposed amendments to the Federal Rules of Bankruptcy Procedure include provisions dealing with financial disclosure, privacy of social security numbers, and multilateral clearing organizations. The proposed amendment to Rule 608(b) of the Federal Rules of Evidence, he said, would codify the Supreme Court's decision in *United States v. Abel*, 469 U.S. 45 (1984), and restore the rule to the original intent of the drafters. The amendment limits the scope of the rule's ban on the use of extrinsic evidence by substituting the term "character for truthfulness" for the overbroad term "credibility."

Judge Scirica added that important legislative developments had occurred recently regarding class actions. He noted that the Advisory Committee on Civil Rules had been studying class-action issues in depth for a decade and had concluded that overlapping and competing class actions in federal and state courts raised serious problems that need to be addressed. But, he explained, the problems do not appear to be susceptible to rules-based solutions. Instead, they will require corrective legislation.

Judge Scirica reported that minimal-diversity class action legislation was likely to receive serious consideration in the current Congress. He noted, though, that the Judicial Conference had traditionally opposed minimal-diversity legislation because of concerns over: (1) principles of federalism; and (2) the potential impact on federal court workloads. He added that the Committee on Federal-State Jurisdiction, which has primary responsibility over the issue, had asked the Conference at its March 2003 session to oppose the "Class Action Fairness Act of 2003" recently introduced in the 108th Congress.

On the other hand, Judge Scirica said, the rules committee — which is responsible for Federal Rule of Civil Procedure 23 and has been considering class actions intensely for more than a decade — has recommended that the Conference not oppose the legislation. Rather, he said, it has recommended that the Conference endorse the general concept of minimal diversity, but leave to Congress the specifics of any legislation.

He added that the chairs of the two committees had consulted with each other and had produced an appropriate reconciliation of the competing positions, which the Conference adopted in March 2003. Nevertheless, a difference of opinion resurfaced shortly after the Conference session in preparing a response to a request from a member of the Senate Judiciary Committee seeking specific proposed statutory language. The Executive Committee of the Conference considered the different approaches suggested by the two committees and decided to adopt the proposed response of the rules committee with some modifications. Thus, Judge Scirica said, the Judicial Conference is now on record as supporting minimal-diversity legislation in concept, but without endorsing any specific language.

Judge Scirica reported that the comprehensive project to restyle the Federal Rules of Civil Procedure is off to a great start, and he complimented the efforts and sound advice of the Style Subcommittee (Judge Murtha, Judge Thrash, and Dean Kane) and the style consultants (Professor Kimble and Mr. Spaniol). He explained that the Style Subcommittee will have the final word on issues of style, and the Advisory Committee on Civil Rules will have the final word on issues of substance, including deciding whether an issue is one of style or substance. Judge Scirica added that the project will take a cautious approach and avoid all changes that could be perceived as substantive and possibly lead to litigation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 16-17, 2003.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the Administrative Office was monitoring several pieces of legislation that may impact the federal rules. He stated that the House version of the Class Action Fairness Act raised rules-related issues regarding interlocutory appeals and notice of proposed settlements. The Senate, he added, was focusing its deliberations on the appropriate threshold levels for minimal-diversity jurisdiction.

Mr. Rabiej reported that the recently enacted "E-Government Act" was designed to promote public access to government information in electronic form. He explained that the Act, among other things, requires the Judicial Conference to develop rules under the Rules Enabling Act to protect privacy and security concerns relating to electronic

filing of documents with the courts and public availability of those documents. He added that there is a controversial provision in the Act, sponsored by the Department of Justice but opposed by the Judicial Conference, that requires courts to accept unredacted filings from the parties.

Mr. Rabiej reported that section 610 of the "PROTECT Act of 2003," which took effect on April 30, 2003, directly amended FED. R. CRIM. P. 7(c)(1) to permit an unknown defendant to be named in an indictment if the defendant has a particular DNA profile, as defined in 18 U.S.C. § 3282.

Mr. Rabiej stated that the "Bail Bond Fairness Act of 2003" (H.R. 2134) would amend FED. R. CRIM. P. 46(f)(1) to eliminate a judge's authority to forfeit bail bonds for violations of any conditions of release other than failure of the defendant to appear before the court as ordered. He explained that the bail-bond industry has promoted the statutory change, but the judiciary had provided statistics requested by Congress showing that the number of forfeitures for conditions other than failure to appear is minimal. The chair of the Advisory Committee on Criminal Rules suggested that the bail bondsmen were really more concerned with state court practice, and they were likely seeking to change the federal practice to serve as a model for the states. Judge Scirica noted that the judiciary may need the support of the Department of Justice on this issue.

Mr. Rabiej reported that the proposed "Sunshine in Litigation Act of 2003," introduced by Senator Kohl, included restrictions on sealing settlement orders. He noted that the Federal Judicial Center had been asked to conduct an empirical study of court practices regarding the sealing of settlements, and the judiciary will respond to the legislation once the study has been completed. The chair of the Advisory Committee on Civil Rules added that the issue had received a great deal of recent attention because of a new local rule on the subject in the District of South Carolina.

Administrative Report

Mr. Rabiej reported that the rules committee support staff continues to enhance its use of a commercial electronic document-management system that maintains and manages the records of the federal rulemaking process. He stated that it is a very powerful and effective system, and future enhancements will allow Committee reporters to directly interface with the database. He noted that the vendor of the principal software used in the system (Documentum) had just issued a new release of the software, and he asked the Committee to support efforts to obtain funding for conversion to the latest release. Several participants emphasized the importance of the electronic document system to the rules process, and one added that Documentum was indispensable to the civil rules restyling project. The committee, accordingly, expressed strong support for the funding request.

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 added that the Center is studying sealed court settlements and focusing on cases and documents that might be seen to affect matters of "public health and safety." He also noted that a new edition of the Center's *Manual for Complex Litigation* is due for release this summer. Finally, he pointed out that Judge Fern Smith's term as Director of the Center would end shortly and that Judge Barbara Rothstein would assume the position of Director.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachments of May 22, 2003. (Agenda Item 5)

Amendments for Publication

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

Judge Alito reported that the proposed amendment to Rule 4 (appeal as of right – when taken) would clarify the language of subdivision (a)(6) as to what type of "notice" precludes a litigant from moving to reopen the time to file an appeal on the grounds that it did not receive "notice" of the entry of judgment. Under the rule, as amended, only receipt of formal notice of judgment from the clerk of the district court under FED. R. CIV. P. 77(b) would preclude the litigant's motion to reopen. In addition, the amended rule provides that the motion to reopen must be filed within 7 days after the litigant receives "written" notice of the entry of judgment from any source. The committee note defines "written" broadly.

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

Judge Alito explained that Rules 26(a)(4) (computing time) and 45(a)(2) (when the clerk's office is open) would be amended to replace "President's Day" with "Washington's Birthday," the correct statutory name for the holiday.

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

Judge Alito explained that Rule 27 (motions) would be amended to provide that the typeface and type-style requirements that govern briefs under Rule 32(a)(5) and (6)

apply also to motion papers. The amendment, he noted, would prevent abuses that could occur if there were no restrictions on using small typeface to cram too many words onto a page.

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

Judge Alito pointed out that the appellate rules currently provide little guidance regarding briefing in cases that involve cross-appeals. The gaps in the rules have caused problems for bench and bar and have led to the development of inconsistent local court rules. The proposed new Rule 28.1, he said, would consolidate in one place the few existing cross-appeal provisions and add several new provisions.

Judge Alito noted that the advisory committee was in complete agreement on the proposed changes except for the provision in subdivision (e) that prescribes page limits on the "second brief," *i.e.*, the appellee's response brief. He explained that most appellate courts currently set the limit on the second brief at 30 pages. But, he said, the advisory committee had decided by a 5-4 vote to enlarge the length of the second brief to a maximum of 35 pages. Judge Alito added that several judges had opposed this choice, but it was preferred by the practitioners.

FED. R. APP. P. 32.1

Judge Alito stated that proposed new Rule 32.1 (citation of judicial dispositions) is very controversial. It would require courts to permit the citation of "unpublished" or "non-precedential" opinions. He emphasized the narrowness of the rule, explaining that it does not address the propriety or constitutionality of issuing opinions that lack precedential value, nor does it establish standards for determining whether opinions should be published or be made otherwise publicly available. But, he noted, most opinions, as a practical matter, are already available to the public. He also pointed out that the proposed rule does not address the effect that a court must give to one of its own unpublished or non-precedential opinions or to the unpublished or non-precedential opinions of another court.

Judge Alito stated that the proposed rule represented sound public policy and was intended to improve the perception of fairness and openness in appellate decision-making. He stated that the major opposition to the proposal, which he described as reasonable, is that permitting the citation of unpublished opinions will lead judges to spend more time in crafting them, defeating the very purpose of non-publication. Nevertheless, he said, the advisory committee was not ultimately persuaded by this argument, because the rule does not require a court to treat its unpublished opinions as binding precedent.

Professor Schiltz pointed out that the advisory committee had struggled with the language in the new rule prohibiting or restricting citation to unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgements, or other written dispositions." He explained that it is intended to prohibit a court from singling out unpublished opinions for non-citation if the court allows citation of a wide variety of other sources solely for their persuasive value, such as opinions of other courts, treatises, law review articles, and the like. He suggested that the public comments could be very helpful in improving the language of this provision. Judge Scirica recommended that the proposed amendment be approved for publication with the understanding that the advisory committee will add further explanation in the committee note regarding the restrictions imposed on citation of unpublished opinions. Judge Alito responded that he would be pleased to draft an additional explanation for the note.

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

Judge Alito explained that both Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) state that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." The rule, however, is interpreted in three different ways by the circuits when judges in regular active service are disqualified in a case. Judge Alito stated that the goal of the proposed amendment is to provide a uniform, national interpretation through amendment of the rule. He said that the advisory committee had, by a 5-3 vote, chosen the "case majority" approach. Under that interpretation, disqualified judges do not count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc.

A member asked whether the revised rule might create a possible inconsistency with 28 U.S.C. § 46(c) and whether the proposed change should be pursued through legislation, rather than by rule. Judge Alito responded that the advisory committee had considered the matter and believes that the language of the proposed amendment is a reasonable interpretation of the statute. He added that there was no intent to supersede the statute, but merely to adopt a uniform, national interpretation. Judge Scirica agreed that the three-way split among the circuits needed to be resolved, and he asked the staff to notify the chairs of the congressional judiciary committees at the time of publication to alert them to the interplay between the rule and the statute.

The committee without objection approved all the proposed amendments to the appellate rules for publication 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 27, 2003. (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. BANKR. P. 1011 and 2002(j)

Judge Small stated that the amendments to Rules 1011 (response in an involuntary or ancillary case) and 2002 (notices to the United States) were purely technical in nature, and they were being submitted to the Judicial Conference without the need for publication and public comment. The proposed amendment to Rule 1011 would eliminate an outdated cross-reference to a recently amended rule. The proposed amendment to Rule 2002(j) would reflect restructuring of the Internal Revenue Service and elimination of the position of District Director.

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

FED. R. BANKR. P. 9014

Judge Small reported that the proposed amendment to Rule 9014 (contested matters) would exempt contested matters from the mandatory disclosure and meeting provisions of FED. R. CIV. P. 26. He noted that contested matters generally are less formal and handled much more quickly than adversary proceedings, making the Rule 26 provisions largely ineffective in contested matters. The amended rule, he said, provides that the following provisions in FED. R. CIV. P. 26, as incorporated by FED. R. BANKR. P. 7026, would not apply in a contested matter unless the bankruptcy judge specifically directs otherwise: (1) mandatory disclosure (Rule 26(a)(1)); (2) disclosures regarding expert testimony (Rule 26(a)(2)); (3) additional pretrial disclosure (Rule 26(a)(3)); and (4) the mandatory initial meeting of counsel (Rule 26(f)). Judge Small, however, emphasized that these provisions of FED. R. CIV. P. 26 will still apply in adversary proceedings.

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

OFFICIAL FORM 21

Judge Small explained that the advisory committee had prepared a new Official Form 21 (statement of social security number) implementing the requirement that debtors submit to the bankruptcy clerk a verified statement setting forth their full social security number. The form works in conjunction with an amendment to FED. R. BANKR. P. 1007(f), taking effect on December 1, 2003, that implements the privacy policy of the Judicial Conference limiting disclosure of social security numbers to the general public.

The form, which would not be part of the official case file, would give the bankruptcy clerk the full social security number, which must be set forth in the notices sent to creditors. Judge Small added that the advisory committee was recommending that the Standing Committee ask the Judicial Conference to approve Official Form 21 effective December 1, 2003, the same day that the amendment to Rule 1007(f) is scheduled to take effect.

The committee without objection approved the proposed new Official Form 21 by voice vote with the recommendation that the Judicial Conference make it effective on December 1, 2003.

Amendments for Publication

FED. R. BANKR. P. 1007

Judge Small stated that the proposed amendments to Rule 1007 (lists, schedules, and statements) would nationalize the widespread local requirement that debtors file a "mailing matrix" with the court setting forth the names and addresses of the entities to whom notices must be sent. It would also ensure that codebtors and parties to executory contracts or unexpired leases of the debtor receive notice of the filing of the bankruptcy case.

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

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that Rules 3004 (filing of claim by debtor or trustee) and 3005 (filing of claim, acceptance, or rejection by co-debtor) were being amended to make them fully consistent with § 501(c) of the Bankruptcy Code. The statute authorizes the debtor or trustee to file a proof of claim if the creditor fails to do so in a "timely" fashion. Under the amended rule, the debtor and trustee would have to wait until the creditor's opportunity to file a claim has expired.

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

FED. R. BANKR. P. 4008

Judge Small stated that Rule 4008 (reaffirmation agreement) was being amended to establish a deadline for filing reaffirmation agreements with the court. Under the amendment, the agreement must be filed not later than 30 days after entry of an order granting a discharge, or confirming a plan in the case of a chapter 11 reorganization of an individual debtor. The rule would leave to the discretion of the court the scheduling of any reaffirmation hearing.

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

FED. R. BANKR. P. 7004

Judge Small stated that Rule 7004 (process and service) was being amended to allow the clerk of court to sign, seal, and issue a summons electronically, which would then be printed and served with the complaint in the conventional manner. The suggestion for the rule change came from a bankruptcy court that is in the process of implementing the Case Management/Electronic Case Files system.

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

FED. R. BANKR. P. 9006

Judge Small explained that the amendment to Rule 9006 (time computation) was being proposed in tandem with a proposed amendment to FED. R. CIV. P. 6(e). Both would clarify the method for counting the number of additional days a party is given to respond when service is made by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served.

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

Informational Item

Judge Small reported on the status of the comprehensive bankruptcy legislation pending in Congress and on the advisory committee's efforts to be prepared to move quickly with proposed amendments to the rules and forms if the legislation passes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of May 21, 2003. (Agenda Item 7)

Amendments for Publication

FED. R. CIV. P. 5.1 and 24(c)

Judge Levi explained that the genesis for the proposed new Rule 5.1 (notice of constitutional challenge to a statute) had been a public comment in response to the proposed amendment to FED. R. APP. P. 44, which took effect in 2002. The amendment to the appellate rules added a new subdivision (b) specifying a procedure for notifying a court of appeals when a party questions the constitutionality of a state statute. The public comment suggested that the counterpart provision in the civil rules — set forth in FED. R. CIV. P. 24(c) — is inadequate and should be redrafted to emulate the change in FED. R. APP. P. 44.

Judge Levi explained that the Department of Justice had taken up the suggestion and sponsored the proposed changes in the civil rules. He noted that the Department reports that it often fails to receive notice when the constitutionality of a statute is questioned in a district-court action. Judge Levi added that the new rule requires dual notification to the Department — both by the district court and by the party drawing into question the constitutionality of a statute. Nevertheless, he said, the duplication is not wasteful.

Participants pointed to some differences between the proposed new civil rule and FED. R. APP. P. 44. They expressed concern over having two rules that implement — somewhat differently — the same statute, 28 U.S.C. § 2403. Judge Alito and Professor Schiltz agreed to consider this issue at the next meeting of the Advisory Committee on Appellate Rules. Judge Small added that the proposed rule also has potential implications in the bankruptcy courts.

The committee without objection approved the proposed new rule and deletion of language in Rule 24 for publication by voice vote.

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

Professor Cooper stated that the proposed amendment to Rule 6 (computation of time) would clear up an ambiguity in the rule as to the correct way of calculating the three days added to prescribed time periods after service is made by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served. The

amendment specifies that counting of the three days begins after the prescribed period to respond expires.

One of the members commented that the committee note accompanying the proposed amendment was a model of brevity and clarity on a confusing issue. Judge Small observed that although FED. R. CIV. P. 6(e) does not directly apply in bankruptcy proceedings, FED. R. BANKR. P. 9006 contains a parallel provision to Rule 6(e), and the two should conform.

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

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

Professor Cooper noted that Rule 27(a)(2) governs notice and service of a petition for a deposition to perpetuate testimony before an action is filed. He pointed out that the amendment was necessary to correct an outdated cross-reference to former Rule 4(d) regarding service on expected adverse parties. He explained that the 1993 amendments to Rule 4 had scattered the service provisions of former Rule 4(d) among several different subdivisions of Rule 4. Accordingly, the cross-reference needed to be revised to apply to all of Rule 4. In addition, the proposed amendment makes it clear that Rule 4 service is effective service as to all classes of adverse parties.

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

FED. R. CIV. P. 45(a)(2)

Professor Cooper stated that the proposed amendment to Rule 45 (subpoenas) would close a gap in the rule by giving notice of the means of recording a deposition to the deponent. He explained it is helpful for the deponent, as well as the parties, to know in advance the means proposed for recording the deposition because it gives them a reasonable opportunity to object to the means or to seek a protective order.

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

Amendments for Deferred Publication

STYLE REVISION PROJECT
FED. R. CIV. P. 1-15

Judge Levi reported that the goal of the restyling project is to improve the style, readability, and consistency of the Federal Rules of Civil Procedure, while at the same time avoiding inadvertent changes in substance. He noted that a significant number of small substantive improvements could be made, but consideration of these changes could complicate and slow down the restyling project and make it very difficult to proceed in a timely or efficient manner. He explained that the advisory committee had followed the sound advice of the Advisory Committee on Criminal Rules and had formed two subcommittees, each with primary responsibility over half the civil rules. In addition, each individual member had been assigned to take the lead on designated rules. Judge Levi reported that the procedure is working very well, and several other participants agreed with this assessment.

Judge Levi and Professor Cooper provided a number of specific examples of the types of issues that had arisen during the initial phases of the restyling project. They also pointed out some of the ground rules being followed on the project, such as eliminating obsolete and redundant cross-references, keeping language simple and short, using the active voice, and having more "white space."

Judge Scirica thanked the Style Subcommittee of the Standing Committee, which he noted had been working very closely with the advisory committee and had completed a great deal of high-quality work in a very short time. He also thanked Mr. Hennemuth for his dedication and enormous output in staffing the restyling project. He noted with regret, however, that Mr. Hennemuth would be leaving the restyling project to assume the position of Deputy Chief of the Administrative Office's Article III Judges Division.

The participants discussed the appropriate time-frame for publishing the body of restyled civil rules. Judge Scirica suggested that the Standing Committee approve the rules for publication, but delay actual publication until August 2004.

The committee without objection approved the proposed restyled rules for deferred publication by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes, Judge Trager, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachments of May 15, 2003. (Agenda Item 6)

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 35(c)

Judge Carnes reported that the proposed amendment to Rule 35 (correcting or reducing a sentence) would add a new a subdivision (c) defining "sentencing" as the oral announcement of the sentence by the court. He explained, however, that the proposal, in the form published for public comment, had defined sentencing as the entry of judgment. The public comments, he noted, had been mixed, and the Department of Justice was among the opponents of the proposed change. He reported that the advisory committee had found the objections persuasive and had decided to recast the amendment to define sentencing as the oral announcement of sentence. The amendment, he added, reflects the majority view of the courts of appeals addressing the issue.

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

FED. R. CRIM. P. 41

Judge Carnes reported that several changes were being proposed in Rule 41 (search and seizure) to address tracking-device warrants. The proposed amendments, he noted would: (1) provide procedural guidance to judges in issuing tracking-device warrants; and (2) add a provision for delaying any notice required by the rule. Professor Schlueter added that magistrate judges favor the proposed amendments, and there is general public support for them.

Judge Carnes explained that the amendments would not require a warrant for a tracking device in every instance. And they would not resolve the issue of whether a tracking-device warrant may issue only upon a showing of probable cause. They provide merely that the magistrate judge must issue the warrant if probable cause is shown.

The committee approved the proposed amendments, with Deputy Attorney General Thompson abstaining.

Following the meeting, the deputy attorney general expressed some concerns about the proposed changes to Rule 41, and he asked the committee to defer transmitting

them to the Judicial Conference for final approval. In light of his concerns — and because the Department of Justice itself originally had proposed the rule changes — the committee decided to defer transmitting the amendments in order to give the Department additional time to consider the proposal.

REVISION OF THE RULES GOVERNING § 2254 CASES AND § 2255 PROCEEDINGS

Judge Carnes reported that following the successful restyling of the Federal Rules of Criminal Procedure, the committee obtained approval from the Standing Committee to proceed with a review of the § 2254 and § 2255 Rules. He asked Judge Trager, who had chaired the subcommittee that had taken the lead in restyling the rules, to describe the proposed changes.

Judge Trager noted that there had not been any significant changes to the habeas rules for nearly 25 years. He stated that there were relatively few differences between the § 2254 Rules and the § 2255 Rules, and the advisory committee was recommending similar changes to both sets of rules. One necessary difference between the two, he noted, is in Rule 5(b) (addressing the allegations) because there is no requirement in § 2255 cases that a movant exhaust remedies. Professor Schlueter added that the district court in a § 2255 case already has the file and knows what has already happened.

Judge Trager reviewed each rule in turn and focused on the most significant changes. First, he pointed out that Rule 1(b) (scope) will continue to specify that any or all of the rules may be applied in a case brought under 28 U.S.C. § 2241. He also pointed to a significant substantive change in Rule 3 (filing the petition) of the § 2254 and § 2255 Rules. Under the current rules, he said, the clerk may reject a petition that does not comply with the rules. The advisory committee, however, was of the view that this approach is too punitive given enactment of the short one-year statute of limitations for § 2254 petitions in the Antiterrorism and Effective Death Penalty Act of 1996. The revised rules, instead, require the clerk to accept a defective petition and enter it on the docket. This approach, moreover, is consistent with FED. R. CIV. P. 5(e), which provides that the clerk may not refuse to accept a civil filing solely for the reason that it fails to comply with the federal rules or with local rules of court.

Judge Trager pointed out that a change was being made in Rule 4 (preliminary review by the court) in the § 2254 and § 2255 Rules to substitute "motion or other response" for the current term "pleading." This reflects the common practice for responses in habeas corpus cases to be made by way of motion. A related change was being made in Rule 5 (answer and reply) of the § 2254 Rules. In addition, a reference to "affirmative defenses" in the published draft had been deleted, and the committee note points out a potential substantive change in the rule in that it requires that the answer address procedural bars and any statute of limitations. Judge Trager noted that the

advisory committee had also made a substantive change in Rule 9 (second or successive petition) of the § 2254 Rules to reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996 requiring a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition.

Some specific language changes were suggested by the members, and one participant suggested that the Style Subcommittee should take another look at the proposed changes before they are submitted to the Judicial Conference. Another suggested that a general protocol might be established for the future under which the Style Subcommittee is given a final opportunity to comment on all proposed changes before advisory committee reports are sent to the Standing Committee. But it was pointed out that there is generally not enough time between the meetings of the advisory committee and the Standing Committee for a final, formal review by the Style Subcommittee. Judge Scirica stated that he was pleased that the advisory committee had received input from the Style Subcommittee throughout the restyling process.

The committee without objection approved the proposed revision of the Rules Governing § 2254 Cases by voice vote.

REVISION OF THE FORMS FOR §§ 2254 AND 2255 CASES AND PROCEEDINGS

Judge Trager explained that the forms used for filing petitions and motions under §§ 2254 and 2255 need to be updated to comport with the Antiterrorism and Effective Death Penalty Act of 1996. In addition, he pointed out that the advisory committee had debated whether it would be helpful for Question 12 on the two forms to include a current list of all possible grounds for relief that a prisoner might claim. Judge Trager said that a majority of the advisory committee did not believe that maintaining such a list would be helpful, and he added that district courts are free to modify the forms to suit local practices.

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

It was also noted, historically, that the habeas corpus forms — unlike the Official Bankruptcy Forms — have been presented to Congress as part of the rules amendments package, although this procedure is probably not required.

Amendments for Publication

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

Judge Carnes reported that the proposed amendments to Rule 12.2(d) (notice of insanity defense) would fill a gap in the rule by adding a sanctions provision for failure to comply with Rule 12(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

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

FED. R. CRIM. P. 29(c)(1), 33(b)(2), 34(b), and 45(b)(2)
Rulings on Motions for Extension of Time

Judge Carnes explained that under the current rules a court must actually rule on a defendant's motion for an extension of time within the 7-day period specified for filing the underlying motion itself under Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), and Rule 34 (motion to arrest judgment). If the court does not act on the motion to extend within the 7 days — even if the defendant actually filed the motion to extend within the 7-day period — the court may lack jurisdiction to act on the underlying substantive motion.

He explained that the current rules do not represent sound policy and may trap the court by requiring it to act within 7 days or lose jurisdiction to consider the underlying motion. The proposed amendments, he added, are consistent with all the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction.

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

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

Judge Carnes reported that Rule 32(i)(4) (sentencing and judgment) currently provides an opportunity for allocution at sentencing for victims of crimes of violence and sexual abuse. He said that the Advisory Committee had determined to extend the same opportunity to victims of felonies that do not involve violence or sexual abuse.

Deputy Attorney General Thompson suggested adding a statement in the committee note to the effect that the amendment does not prohibit a judge from hearing from a representative on behalf of the victim of a non-violent crime. Professor Schlueter

explained, though, that there is considerable concern as to who is an appropriate spokesperson for the victim. He agreed that public comments would be very helpful, and he stated that the committee was aware of the interest of Congress in victims' rights.

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

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

Judge Carnes explained that an opinion from the Eleventh Circuit had noted that there is no explicit provision in Rule 32.1 (revoking or modifying probation or supervised release) giving a defendant a right to allocution upon resentencing at a revocation proceeding. The proposed amendment recognizes the importance of allocution and would explicitly extend it to hearings involving revocation or modification of probation or supervised release.

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

FED. R. CRIM. P. 59

Judge Carnes explained that the proposed new Rule 59 (matters before a magistrate judge) would specify procedures for district judges to review nondispositive and dispositive decisions by magistrate judges. He noted that the rule had been drafted following the decision of the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F. 3d 959 (9th Cir. 2001), holding that the rules currently do not require that an appeal to a district judge from a nondispositive decision by a magistrate judge be taken as a prerequisite for review by the court of appeals. In its decision, the court suggested that FED. R. CIV. P. 72 might serve as a model for a counterpart rule in the Federal Rules of Criminal Procedure. Under the new rule, a party must file timely objections to a magistrate judge's decision. Failure to object waives the party's right to review.

Judge Carnes reported that the advisory committee originally had drafted a rule addressing not only appeals from magistrate judges' decisions but also the taking of guilty pleas by magistrate judges in felony cases. The latter provision, he said, had been dropped because of concerns raised by the Magistrate Judges Committee of the Judicial Conference and because the case that had provided the impetus for including a reference to guilty pleas had been vacated. *See United States v. Reyna-Tapia,* 294 F. 3rd 1192 (9th Cir. 2001), *vacated,* 315 F. 3rd 1107 (9th Cir. 2002).

Judge Carnes and Professor Schlueter agreed to consider adding to the committee note language: (1) to explain that the requirement that a "record" be made of the proceedings before the magistrate judge is satisfied by recording by mechanical means, especially when no objection is filed to the action of the magistrate judge; and (2) to state that the rule does not purport to define "dispositive" and "non-dispositive."

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

Informational Item

Judge Carnes reported that the advisory committee was considering very controversial amendments offered by the Department of Justice that would prohibit a district judge from granting a motion for judgment of acquittal under Rule 29 until after the jury returns a verdict of guilty. He stated that the advisory committee would consider the proposal at its next meeting and had asked the Federal Judicial Center to conduct a survey of state-court practices on the issue.

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 5, 2003. (Agenda Item 8)

Amendment for Judicial Conference Approval

FED. R. EVID. 804(b)(3)

Professor Capra pointed out that Supreme Court decisions addressing the relationship between the Confrontation Clause and the hearsay exception for declarations against interest had rendered Rule 804(b)(3) (hearsay exception for a statement against interest) inconsistent with constitutional standards in cases where declarations against penal interest are offered against a criminal defendant. He explained that the proposed amendment specifies that a declaration is admissible against the defendant only if supported by "particular guarantees of trustworthiness." This usage, he said, tracks the language used by the Supreme Court in its Confrontation Clause jurisprudence. Professor Capra explained that the amendment also addresses some meritorious comments submitted by the Department of Justice.

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

Informational Items

Judge Smith explained that the advisory committee, as part of its ongoing, comprehensive review of problem areas and possible changes in the evidence rules, had decided to reject proposed changes to Rule 106 (to expand the rule of completeness to cover oral as well as written statements), Rule 404(a)(1) (to explicitly authorize admission of character evidence to prove a trait of character when essential to a claim or defense), and Rule 803(6) (to codify the "business duty" requirement). He reported that the advisory committee was continuing to consider suggested changes in other rules, particularly Rule 408 regarding compromise and offers to compromise.

LOCAL RULES PROJECT

Judge Scirica commended Professor Mary Squiers for her work in conducting a comprehensive study of local court rules and filing a detailed report. He noted that final committee action on the project would be deferred until the January 2004 meeting. He added that Professor Squiers would add some material to the report, and Professors Capra and Cooper and Judge Fitzwater will participate in this effort.

Judge Scirica added that the committee was under a statutory and rules mandate to eliminate inconsistencies in the local rules vis a vis the national rules. Professor Coquillette explained that following the January meeting, the committee would send a relatively narrow letter to each chief district judge identifying any local rules that may be problematic and providing information about the committee's mandate. Several participants suggested the potential value of the report as an educational resource for the judiciary.

MASS CLAIMS

Judge Scirica introduced Professor McGovern as an old friend and great resource to the committee who has been deeply involved in mass-claims issues for several years, both as a scholar and a mediator. Judge Scirica asked Professor McGovern for his thoughts on whether: (1) bankruptcy is the preferred vehicle for resolving mass claims; and (2) the Advisory Committee on Civil Rules should continue to consider amending FED. R. CIV. P. 23 to provide for settlement-only classes.

Professor McGovern pointed to the significance of the pending Fairness in Asbestos Injury Resolution Act of 2003, which would establish a no-fault scheme for claims resolution and review by an Article I court. He predicted that if that legislation fails to pass, it is likely that other legislation will be introduced to enact a "hybrid" claims

resolution mechanism — akin to the asbestos provisions in § 524(g) of the Bankruptcy Code, but not actually incorporated in the Bankruptcy Code. Finally, he said, if that alternative approach fails, the rules committees should expect to become the focus of attention through various proposals for rules amendments that combine aspects of both bankruptcy and class-action practice.

Currently, he said, the only procedural vehicle available for companies facing asbestos exposure and seeking global peace is § 524(g). It requires a 75% vote of claimants to approve a plan of reorganization, authorizes appointment of a representative for future claimants, requires that future claimants be treated equivalently to current claimants, and specifies that 51% of the equity in the reorganized company be placed in a trust fund for current and future claimants. A debtor who is able to meet all these requirements can discharge its asbestos liability. But, he added, § 524 is simply not appropriate for all companies, especially since it requires a company to go into bankruptcy. Moreover, § 524(g) applies only to asbestos, and not to other types of mass-tort claims.

Professor McGovern emphasized that the asbestos problem will not go away, and other types of mass torts are likely to experience the same phenomena as asbestos. He suggested that if both the pending asbestos legislation and potential hybrid bankruptcy legislation fail, the Advisory Committee on Civil Rules should expect to receive proposals to establish a mechanism under FED. R. CIV. P. 23 that would enable a company facing mass tort liability to obtain finality without going into bankruptcy. The shape of a potential proposal, for example, might authorize an opt-in class, and it might authorize an Article III judge to certify a mandatory class binding all claimants — if, for example, a threshold number of claimants with a threshold value of claims opt in, and if the claims have reached a certain stage of litigation maturity.

He added that it would be very helpful to have a statutory provision authorizing the appointment of a representative for future claimants. And he concluded that, whatever the particular approach may be, there is a great demand both by defendant corporations and plaintiffs' lawyers for a procedural mechanism that provides both for the reasonable resolution of competing claims and for an end to a company's liability exposure.

Professor McGovern suggested that the Advisory Committee on Civil Rules might wish to sponsor a conference on this topic, since it calls out for serious academic attention and input from bench and bar. Judge Levi stated that the advisory committee would be interested in a conference, but it would necessarily proceed cautiously in light of the fiercely competing private interests, as well as the prerogatives and current interests of Congress in the area.

TECHNOLOGY

Judge Fitzwater and Professor Capra presented the report of the Technology Subcommittee. Professor Capra pointed out that the subcommittee had been working cooperatively with the Court Administration and Case Management Committee on the model court rules for electronic filing in civil, bankruptcy, and criminal cases.

Professor Capra added that discovery of materials in electronic format has emerged as an important focus for potential amendments to the civil rules. He said that the subcommittee would assist the Advisory Committee on Civil Rules regarding potential amendments to the discovery rules. Judge Fitzwater added that the subcommittee had received valuable assistance from Mr. Rabiej and Nancy Miller of the Office of Judges Programs in the Administrative Office.

ATTORNEY CONDUCT

Professor Coquillette explained that a task force appointed by the committee had developed potential national rules addressing attorney conduct. He noted, though, that the project was currently on hold, and no further action would be taken until Congress, the Department of Justice, or the Conference of Chief Justices requests it. Judge Scirica added that there has been a difference of opinion between the Senate and the House of Representatives on how to address attorney conduct on the part of federal-government attorneys. He advised that it is sound advice for the rules committees to defer further action until the interested parties reach some sort of agreement on the key issues.

Professor Coquillette explained that attorney conduct in the federal courts is governed by local court rules. He said that there are substantial differences among the local rules, causing problems for attorneys generally and for Department of Justice prosecutors particularly. He added that the preference of the committee has been to adopt a single national rule of "dynamic conformity" specifying that attorney conduct in the federal courts is governed by the current rules of the highest court of the state in which the federal court sits. Limited exceptions, however, could be carved out from the rule of dynamic conformity to address on a national basis certain unique problems facing federal-government attorneys.

Chief Justice Veasey reported that every state supreme court is reviewing model rules flowing from the American Bar Association's Ethics 2000 project. He said that the Conference of Chief Justices favors greater national uniformity with only minor variations from state to state.

Deputy Attorney General Thompson pointed out that Rule 4.2 of the ABA's Model Rules of Professional Conduct, governing contacts with represented parties, is of special concern to Department of Justice lawyers, especially in light of the recent corporate scandals. He added that the Department needs to reach a consensus internally before it negotiates attorney conduct proposals further with the American Bar Association and the Conference of Chief Justices.

LONG-RANGE PLANNING AND BUDGETING

Judge Scirica and Mr. Rabiej reported that the March 2003 long-range planning meeting of Judicial Conference committee chairs had focused mostly on issues of concern to the program committees of the Conference, rather than the rules committees.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled for January 15-16, 2004, in Scottsdale, Arizona.

The secretary would like to thank Kathryn Marrone very much for her invaluable assistance in preparing a draft of the minutes of the meeting.

Respectfully submitted,

Peter G. McCabe,
Secretary