Agenda E-19
Rules
September 2006

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on June 22-23, 2006. The Deputy Attorney General, Paul J. McNulty, attended part of the meeting along with Robert D. McCallum, Associate Attorney General; Ronald J. Tenpas, Associate Deputy Attorney General; Alice S. Fisher, Assistant Attorney General for the Criminal Division; and Elizabeth U. Shapiro, Assistant Director, Federal Programs Branch, Civil Division, Department of Justice.

All the other members attended. Chief Justice John G. Roberts, Jr., and Associate Justice Samuel A. Alito, Jr., former member and former chair of the Advisory Committee on Appellate Rules, respectively, also attended part of the meeting.

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Thomas S. Zilly, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Susan C. Bucklew, chair, and Professor Sara Sun Beale, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida, Timothy K. Dole, and Jeffrey N. Barr, attorney advisors in the Administrative Office; Emery G. Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Federal Judicial Center; and Joseph F. Spaniol consultant to the Committee. Professor R. Joseph Kimble, the Committee's style project consultant, participated by telephone.

Implementing E-Government Act

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules submitted proposed uniform language for an amendment to Appellate Rule 25, and for new Bankruptcy Rule 9037, new Civil Rule 5.2, and new Criminal Rule 49.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and new rules implement the privacy and security provisions of § 205 of the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), governing electronic filings in federal court. The amendments and rules were published for public comment for a six-month period. The scheduled public hearings were canceled because only one witness requested to testify. That witness testified at the Committee's January meeting with the chairs of the advisory committees present.

The proposed package of amendments and new rules is derived from the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The Conference policy requires that documents in case files generally be made available electronically to the same extent that they are available at the courthouse, provided that certain "personal data identifiers"

are redacted in the public file, including the first five digits of a social-security number, the name of a minor, and the date of a person's birth.

In accordance with the Act's call for uniformity, the proposed new rules are identical in many respects. For example, certain pre-existing records of administrative, agency, and state-court proceedings and pro se habeas corpus filings are exempted from the redaction requirement under each of the proposed rules. Under another uniform provision, a court may, for good cause, authorize redaction of information in addition to personal identifiers or limit a nonparty's remote electronic access to documents to safeguard privacy interests. Each proposed rule also permits the filer of a document to elect not to redact the filer's own personal-identifier information, waiving the rule's protections.

There are a few differences in the proposed rules to account for factors unique to each set of rules. Proposed Civil Rule 5.2 specifically limits remote access to social security and immigration electronic case filings. The Social Security Administration and Department of Justice asked the advisory committee to give special treatment to these cases due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited in these cases to the docket and the written dispositions of the court unless the court orders otherwise. Proposed new Criminal Rule 49.1 permits the partial redaction of an individual's home address and an exemption from redaction for certain information needed for forfeitures. Additional filings are exempted from the redaction requirement, including arrest and search warrants, charging documents, and documents filed before the filing of a criminal charge. Proposed Bankruptcy Rule 9037 uses several different terms consistent with terms used in the Bankruptcy Code. It also requires disclosure of the full names of a debtor, even if a minor. New

Appellate Rule 25(a)(5) would apply the privacy rule that had applied to the case below to govern in the case on appeal.

The Committee on Court Administration and Case Management raised a concern during the public-comment period that remote electronic access to an indictment might jeopardize the safety of the foreperson signing it. Under Criminal Rule 6(c), the foreperson must sign all indictments, and under Rule 6(f) an indictment must be returned in open court. No empirical data has been presented showing added risks to forepersons whose signatures on indictments have been publicly available. Such evidence as there is suggests that forepersons have not been subject to threat because the indictment has been part of the public case file. Nor is an easy practical administrative solution apparent to redact a foreperson's name from the record. For these reasons and because the advisory committee determined that redaction of the foreperson's name would raise sensitive policy questions about the public nature of criminal proceedings, the advisory committee decided that the issue requires further careful study. The advisory committee will undertake this study promptly. However, the advisory committee decided that the study should not delay proceeding with the proposed new rule. The Committee on Court Administration and Case Management approves of this approach to this issue.

The proposed amendments and new rules are contained in the appendices to this report.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules presented one item for the Committee's action, proposing an amendment to Appellate Rule 25 to implement the E-Government Act, which was discussed above.

The Committee concurred with the recommendation of the advisory committee.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 25 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is in Appendix A with an excerpt from the advisory committee report.

Informational Items

The advisory committee is studying the Solicitor General's suggestion to impose limitations on the filing of "pro se" briefs by represented parties. It is also studying two proposals on amicus briefs, one dealing with the time to file the brief and the other requiring a statement disclosing the monetary and other contributions to the preparation of the brief.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1, and new Rules 6003, 9005.1, and 9037 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and rules were circulated to the bench and bar for comment in August 2005. The scheduled public hearing on the proposed changes was canceled because no one asked to testify.

The proposed amendment to Rule 1014 is consistent with general case law and states explicitly that a court on its own motion may dismiss or transfer a case that had been initially filed in an improper district.

The proposed amendment to Rule 3007 prohibits a party in interest from including in a claim objection a request for relief that requires an adversary proceeding. The amendment also

allows a party to join a maximum of 100 claims in a single, omnibus objection. The amendment specifies the content and limits the nature of objections that may be joined in the single filing. It also establishes minimum standards intended to protect the claimants' due process rights.

The proposed amendment to Rule 4001 requires a movant to provide a proposed order granting relief, together with notice to interested parties, when requesting authority to use cash collateral, to obtain credit, or to obtain approval of agreements to provide adequate protection, modify, or terminate the stay, or to grant a senior or equal lien on property. The amendment requires the movant to include within the motion a statement not to exceed five pages that concisely describes the material provisions of the relief requested.

Proposed new Rule 6003 limits the granting of interim and final relief by the court during the first 20 days after commencement of a case. Absent a showing of immediate and irreparable harm, a court cannot grant relief during the first 20 days of a case on applications for the employment of professional persons, motions for the use, sale, or lease of property of the estate (other than a motion under Rule 4001), and motions to assume or assign executory contracts and unexpired leases. The proposed rule is designed to alleviate the acute time pressures present at the start of a case so that full and careful consideration can be given to matters that may have a fundamental and long-lasting impact on the case.

Rule 6006 would be amended to authorize a movant to file an omnibus motion rejecting, or under specific circumstances assuming or assigning, a maximum of 100 executory contracts or unexpired leases. The amendment establishes minimum standards intended to ensure the protection of the claimants' due process rights. Under the amendment, the trustee may assume, but not assign, multiple executory contracts and unexpired leases in the omnibus motion.

The proposed amendment to Rule 7007.1 clarifies that a party must file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

Proposed new Rule 9005.1 makes Civil Rule 5.1, dealing with notice requirements in cases involving a constitutional challenge of a statute, applicable to all contested matters and other proceedings in a bankruptcy case.

Proposed new Rule 9037 implements the E-Government Act and has been discussed above.

The Committee concurred with the recommendations of the advisory committee.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1, and new Bankruptcy Rules 6003, 9005.1, and 9037 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Interim Rules and Official Forms Recommended for Approval and Transmission

The advisory committee submitted proposed amendments to Interim Rule 1007, and amendments to Bankruptcy Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendment to Interim Rule 1007 addresses problems with the rule that require prompt attention. (Bankruptcy courts have adopted Interim Rules in their local rules as a temporary measure to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8 – the "2005 Bankruptcy Act"), pending promulgation of permanent changes to the national rules.)

The 2005 Bankruptcy Act amended the Bankruptcy Code to require that consumer debtors receive credit counseling before commencing a bankruptcy case. Interim Rule 1007 implemented that provision by requiring debtors to file a certificate that they completed the counseling in the 180 days before commencement of the case. Experience with Interim Rule 1007 has shown that some debtors complete the counseling but are unable to timely obtain a copy of the certificate, with the result that their bankruptcy case is dismissed. The proposed amendment to Interim Rule 1007(b) and (c) addresses this problem by providing these debtors a 15-day grace period within which to file the certificate.

The proposed amendments to Official Forms 1, 5, and 6 (including Schedules D, E, F, I, and J) implement the statistical reporting requirements that take effect on October 17, 2006, in accordance with the 2005 Bankruptcy Act. Proposed changes to Official Forms 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1 either are stylistic or conform to new language and definitions adopted by the 2005 Bankruptcy Act.

The proposed Exhibit D to Official Form 1 highlights the debtor's obligation to seek credit counseling before filing a bankruptcy petition and the severe consequences for failing to timely do so.

Official Form 9 would be amended to add "family fisherman" to the category of debtors eligible for relief under chapter 12. The amendment also would provide general notice of the potential for the Internal Revenue Service to file a claim – based on the debtor's income tax return – well after the normal deadline for filing a proof of claim.

The proposed amendments to Official Forms 22A and 22C are stylistic and conform to new terms adopted in the 2005 Bankruptcy Act.

Official Form 23 would be amended to require the debtor to verify completion of an instructional course on personal financial management by including the number of the certificate of completion.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

a. Approve distributing the proposed amendment to Interim Rule 1007 to the courts with a recommendation that it be adopted by local rule or standing order to take effect on October 1, 2006; and

b. Approve the proposed revisions to Bankruptcy Official Forms 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to Official Form 1 to take effect on October 1, 2006.

The proposed amendments to Interim Rule 1007 and the Official Forms are in Appendix C with an excerpt from the advisory committee report.

Rules and Official Forms Approved for Publication and Comment

The advisory committee proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009 and new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011 and proposed revisions to Bankruptcy Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, 24, and new Forms 1, 25A, 25B, 25C, 26, and Exhibit D to Form 1 to be published for public comment.

Most of the proposed amendments and new rules are based on the Interim Rules, which the Executive Committee of the Judicial Conference approved in August 2005 for distribution to the courts with a recommendation that they be adopted by local rule or general order. The Interim Rules were necessary because the six months provided under the 2005 Bankruptcy Act

was too brief to prescribe conforming amendments to the national rules under the rulemaking process. Virtually all courts adopted the Interim Rules without change. Based on the courts' favorable experience with them, the proposed amendments to the national rules use language almost identical to the language used in the Interim Rules, with only slight adjustments to certain rules.

Proposed amendments to Rules 1005, 3016, 5001, and 9009 and proposed Rule 2015.3 are new. The changes are necessary to comply with various provisions in the 2005 Bankruptcy Act and a revised section in title 28, but they did not have to be in place by October 17, 2005, and were not included in the Interim Rules.

Rule 1005 would be amended to implement § 727 of the Code, as revised by the 2005 Bankruptcy Act, to require the disclosure of all names used by the debtor in the past eight years, rather than the past six years. The amendment also requires disclosure of the last four digits of an individual debtor's taxpayer-identification number.

Rule 1006 would be amended to implement 28 U.S.C. § 1930(f), as revised by the 2005 Bankruptcy Act, which authorizes a court to waive the payment of filing fees by a debtor in a chapter 7 case. The amendment permits the court to allow a debtor to pay the filing fee in installments even if the debtor had made a payment to an attorney in connection with the case.

Rule 1007 would be amended to require a debtor to file a variety of documents and materials mandated under § 521 and related provisions of the Code, as revised by the 2005 Bankruptcy Act, including payment advices, education income retirement accounts, certificates of completion of credit counseling and financial management programs, and current monthly income statements and other forms to implement the Act's means test. The amendments limit the extension of time that may be granted to a small-business debtor to file schedules and

statements. The amendments also require a debtor filing a petition to commence a case under chapter 15 of the Code, dealing with cross-border insolvencies, to include a list of entities with whom the debtor has been engaged in litigation in the United States.

Rule 1009 would be amended to conform to a change made in a cross-reference to § 521 of the Code, as revised by the 2005 Bankruptcy Act.

Rule 1010 would be amended to implement chapter 15, governing both ancillary and cross-border cases, and the repeal of § 304 of the Code by the 2005 Bankruptcy Act. The amendment requires service of a summons and a petition on the debtor and any entity against whom the representative is seeking provisional relief in a pending foreign nonmain proceeding (proceeding in a foreign country where the debtor has an establishment, other than "where the debtor has the center of its main interests").

Rule 1011 would be amended to conform to the new proceedings governing chapter 15 cross-border insolvencies, as added by the 2005 Bankruptcy Act, including a requirement that a corporation involved in a cross-border insolvency case file a corporate disclosure ownership statement.

The cross-references in Rule 1015 would be amended to conform to the change in the numbering of § 522 of the Code, as revised by the 2005 Bankruptcy Act.

Rule 1017 would be amended to permit a party to move to dismiss a chapter 7 consumer-debtor case for abuse in accordance with § 707(b) of the Code, as revised by the 2005 Bankruptcy Act. The amendments preserve the time limits already in place for § 707 motions to dismiss. The amendments also require that a motion filed under § 707(b) state with particularity the circumstances demonstrating the alleged abuse.

Rule 1019 would be amended to address problems with deadlines for filing actions to determine the dischargeability of debts under § 523(a)(6) of the Code that are expected to arise from increased conversions of cases to and from chapters 7 and 13. The amendment preserves a creditor's right to bring these actions in the event that a case is converted from chapter 13 to chapter 7. The amendment also preserves deadlines for motions to dismiss a case under § 707(b) upon conversion of a case from chapter 13 to chapter 7.

Rule 1020 would be amended to provide procedures to determine in a timely fashion whether a debtor is a small-business debtor, consistent with the 2005 Bankruptcy Act, which eliminated the previous provisions in the Code allowing a debtor to elect treatment as a small business.

Rule 1021 would be amended to implement § 101(27A) of the Code, as revised by the 2005 Bankruptcy Act, to provide procedures for designating a debtor as a health-care business. Under the amendment, a party in interest or the United States trustee may file a motion to determine whether the debtor is a health-care business.

Rule 2002 would be amended to require a court to promptly provide all creditors a copy of the United States trustee's statement as to whether the debtor's case would be presumed to be an abuse under § 707(b) in accordance with § 704 of the Code, as revised by the 2005 Bankruptcy Act. The amendment implements other provisions of the Code, as revised by the 2005 Bankruptcy Act, to require a trustee leasing or selling personally identifiable information to include in the notice of the lease or sale transaction a statement whether the lease or sale is consistent with a policy prohibiting the transfer of the information. The amendment also requires that notice of a petition for recognition of a proceeding in a foreign country be given to a debtor and entities against whom provisional relief is sought. Creditors with a foreign address are

provided at least 30 days' notice to file proofs of claims if the notice is mailed to the foreign address, unless the court orders otherwise. A court may direct that notice by other means may supplement notice by mail, or the court may enlarge the notice period for creditors with foreign addresses consistent with § 1514(d) of the Code, as revised by the 2005 Bankruptcy Act.

Rule 2003 would be amended to implement § 341(e) of the Code, as revised by the 2005 Bankruptcy Act, to authorize a court – on request of a party in interest and after notice and a hearing – to find that a meeting of creditors need not be convened if the debtor had already solicited acceptances of a plan prior to the commencement of the case.

Rule 2007.1 would be amended to conform to § 1104 of the Code, as revised by the 2005 Bankruptcy Act, pertaining to the election and appointment procedures governing trustees in chapter 11 cases. The amendment requires an elected trustee to file an affidavit with information regarding the trustee's connections with parties in interest and certain other persons connected with the case.

Proposed new Rule 2007.2 implements § 333 of the Code, as revised by the 2005 Bankruptcy Act, establishing procedures governing the appointment of a patient-care ombudsman during the first 30 days after the filing of a health-care business case. The proposed rule provides that any party in interest that believes that the appointment of a patient-care ombudsman is unnecessary must file its objection and notify other interested parties within the first 20 days of the case. In the absence of a timely objection, the court must enter an order directing the United States trustee to appoint the ombudsman. The proposed rule also permits parties in interest to file a motion to appoint or terminate the appointment of an ombudsman, and it sets forth the procedure for approving the appointment.

Rule 2015 would be amended to implement § 308 of the Code, as revised by the 2005 Bankruptcy Act, to require a small-business debtor to file periodic financial and operating reports. The amendment also requires a foreign representative to file any notice required under § 1518 of the Code, as revised by the 2005 Bankruptcy Act, within 15 days in a case involving a cross-border insolvency case.

Proposed new Rule 2015.1 implements § 333 of the Code, as revised by the 2005 Bankruptcy Act, to require a patient-care ombudsman to provide ten days' notice of reports, and the rule designates the entities to whom the notice must be given. Under the proposed rule, an ombudsman may review patient records only with the court's approval under appropriate restrictions to protect the confidentiality of patient records. The ombudsman must first notify the United States trustee and the patient that the ombudsman is seeking access to otherwise confidential medical records to allow the patient or trustee to object to the review.

Proposed Rule 2015.2 authorizes a trustee to relocate patients when a health-care business debtor's facility is being closed consistent with § 704(a)(12) of the Code, as revised by the 2005 Bankruptcy Act. The trustee may take this action without a court order, but the patient-ombudsman or the patient may seek relief from the trustee's actions.

Proposed new Rule 2015.3 implements § 419 of the 2005 Bankruptcy Act to require a debtor in possession or trustee to file periodic reports of the value and profitability of any entity in which the debtor has a substantial interest.

The time period under Rule 3002 for filing proofs of government claims based on tax returns filed under § 1308 in a chapter 13 case would be amended to conform to the time periods under § 502(b)(9) of the Code, as revised by the 2005 Bankruptcy Act. The time for filing a proof of claim for a creditor who received notice at a foreign address may be extended under the

amendment, if the court finds that the notice was not sufficient to give the foreign creditor a reasonable time to file a proof of claim.

Rule 3003 would be amended to require that a creditor with a foreign address be provided such additional time as is reasonable to file proofs of claims in a chapter 9 or chapter 11 case.

Rule 3016 would be amended to provide that a small-business debtor need not file a disclosure statement in a chapter 9 municipality or chapter 11 reorganization case if: (1) the plan itself includes adequate information, and (2) the court finds that a separate disclosure statement is unnecessary in accordance with § 1125(f)(1) of the Code, as revised by the 2005 Bankruptcy Act. The amendment also provides that a court may approve a disclosure statement submitted on an appropriate Official Form or on a standard form approved by the court.

Rule 3017.1 would be amended to eliminate language in the rule recognizing a debtor's right to elect treatment as a small business. Section 101 of the Code, as revised by the 2005 Bankruptcy Act, defines a "small business case" and a "small business debtor," eliminating any need for an election. The amendment permits a court in a small-business chapter 11 case to conditionally approve a plan if adequate information is provided.

Rule 3019 would be amended to establish a procedure for filing and objecting to a proposed modification of a confirmed plan by an individual debtor in a chapter 11 case consistent with § 1127 of the Code, as revised by the 2005 Bankruptcy Act.

Rule 4002 would be amended to implement § 521 and § 707 of the Code, as revised by the 2005 Bankruptcy Act, which require a debtor to provide a government-issued picture identification and evidence of a social security number, current income, and recent Federal income tax returns or tax transcripts.

Rule 4003 would be amended to permit a trustee to object to an exemption at any time up to one year after the closing of the case if the debtor fraudulently claimed the exemption. The amendment also conforms to § 522(q) of the Code, as revised by the 2005 Bankruptcy Act, which limits the state homestead exemption to $125,000 if the debtor had been convicted of a felony or owed a debt arising from certain causes of action.

Rule 4004 would be amended to implement several provisions added to the Code by the 2005 Bankruptcy Act, which authorize a judge to delay discharge pending the debtor's completion of a financial management program, a finding that the debtor committed a felony or owes a debt arising from certain causes of action within a particular time period, a ruling on a motion to enlarge time to file a reaffirmation agreement, or a ruling on a motion to delay discharge until all required tax documents have been filed.

Rule 4006 would be amended to require the clerk to provide notice to all parties in interest, including the debtor, that no discharge was entered.

Rule 4007 would be amended to conform to § 1328 of the Code, as revised by the 2005 Bankruptcy Act, which expands the exceptions to discharge upon completion of a chapter 13 plan.

Rule 4008 would be amended to establish a deadline for filing a reaffirmation agreement. The amendment also implements § 524 of the Code, as revised by the 2005 Bankruptcy Act, which requires that a debtor file a signed statement and an accompanying statement showing the total income and expense figures from Schedules I and J and an explanation of any discrepancies so that the court can evaluate the reaffirmation agreement for undue hardship.

Rule 5001 would be amended to authorize a bankruptcy judge in emergency situations to hold hearings outside of the district in which the case is pending under 28 U.S.C. § 152.

Rule 5003 would be amended to allow government-taxing authorities to designate addresses to use for the service of a request in accordance with § 505 of the Code, as revised by the 2005 Bankruptcy Act.

Proposed new Rule 5008 implements § 342 of the Code, as revised by the 2005 Bankruptcy Act, to require clerks to give written notice in a chapter 7 case that a presumption has arisen of abuse under § 707(b) to all creditors not later than ten days after the date of the petition filing. A debtor must file a statement containing sufficient information for the clerk to determine whether the petition raises a presumption of abuse.

Proposed new Rule 5012 implements § 1525 of the Code, as added by the 2005 Bankruptcy Act, to provide an opportunity for parties in a case involving a cross-border insolvency to participate on timely request in a court's communication with a foreign court or a foreign representative.

Rule 6004 would be amended to require the appointment of a consumer-privacy ombudsman when a trustee proposes to sell personally identifiable information in accordance with § 332 and § 363 of the Code, as revised by the 2005 Bankruptcy Act.

Proposed Rule 6011 implements § 351(1) of the Code, as revised by the 2005 Bankruptcy Act, to require the trustee to notify patients that their medical records will be destroyed if unclaimed for one year after publication of a notice in an appropriate newspaper. The proposed rule establishes minimum requirements governing the notice to patients, their family members, and contact persons, ensuring that sufficient information is provided regarding the trustee's intent to dispose of the patient's records. Under the proposed rule, the trustee must file a report with the court regarding the destruction of the patient's records.

Rule 8001 would be amended to implement 28 U.S.C. § 158, as revised by the 2005 Bankruptcy Act, to authorize an appeal directly to the court of appeals upon certification by the bankruptcy court, the district court, or the bankruptcy appellate panel. A certification also can be made if all the parties consent. The court of appeals retains discretion to accept the appeal.

Rule 8003 would be amended to implement the direct-appeal provisions of the 2005 Bankruptcy Act. The amendment provides that a certification by a lower court or the allowance of leave to appeal by the court of appeals is deemed to satisfy the requirement for leave to appeal even if no motion for leave to appeal has been filed.

Under the proposed amendment to Rule 9006, the time for filing schedules and a statement of financial affairs by a small-business debtor cannot be extended beyond the time set in § 1116(3) of the Code, as added by the 2005 Bankruptcy Act.

Rule 9009 would be amended to provide that a plan proponent in a small-business chapter 11 case need not use an Official Form of a plan of reorganization and disclosure statement.

The advisory committee also recommended that the revised Official Forms, which took effect in October 2005 without the benefit of public input because of the 2005 Bankruptcy Act short deadlines, be published for comment to provide the bench and bar with an opportunity to raise any concerns with them. The advisory committee will review all comments to determine whether further revisions to the Official Forms are necessary.

No changes are recommended to Official Forms 3A, 3B, 8, 19B, 22B, and 24. Slight modifications are recommended to Official Forms 1, 4, 5, 6, 7, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22C, 23, and Exhibit D to Form 1. Proposed Official Forms 25A, 25B, and 25C, dealing

with small business cases, and Form 26, requiring periodic reports on the profitability of any entity controlled by the estate, are new.

The Committee approved the recommendation of the advisory committee to circulate the proposed amendments to the bench and bar for comment.

Informational Items

The advisory committee withdrew the proposed amendment to Rule 3001, which was published for comment in August 2005. It would have limited the number of pages of materials that could be filed supporting a proof of claim or evidencing perfection of a security interest. The advisory committee concluded that the expected benefit from summarizing the materials in lieu of the full text as provided under the proposed amendment would be offset by problems created by it.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules completed a comprehensive "style" revision of the Civil Rules and the Forms. The revisions are the third set in the project to make "style" revisions to the Federal Rules of Appellate, Criminal, and Civil Procedure to clarify and simplify them without changing their substantive meaning.

The advisory committee submitted four separate sets of proposed amendments to the Civil Rules and Illustrative Forms related to the style project. The first set is the proposed style only amendments to Rules 1 to 86. The second set is a small number of proposals for minor technical amendments that were noncontroversial, made clear improvements, but arguably changed substantive meaning. These "style/substance" changes were approved separately from the restyled rules, to become effective at the same time. The third set is proposed style changes to the Civil Rules amendments due to take effect on December 1, 2006 – new Rule 5.1, amended

Rule 50, and the amended rules involving electronic discovery – to make them consistent with the comprehensive style revisions. Finally, the advisory committee proposed a comprehensive revision of the Illustrative Forms consistent with the style conventions followed in the amended rules.

The Process Used in the Style Project

The work to make the Criminal, Appellate, and Civil Rules clearer, simpler, and easier to understand began in 1992. A nationally recognized legal-writing scholar prepared drafting guidelines to serve as a common set of style preferences and conventions and prepared a first draft of the restyled Civil Rules using those guidelines. The then-chair of the advisory committee refined the draft. The work on the Civil Rules was deferred while the Criminal Rules, then the Appellate Rules, were successfully revised using the uniform drafting guidelines. The improvement in the rules resulting from the style revisions led the advisory committee to return to the work on the Civil Rules.

The advisory committee and the Committee set up a procedure that required repeated and numerous levels of review to ensure that the style revisions were as clear as possible without changing substantive meaning. The Committee appointed a style subcommittee to work with a prominent legal-writing scholar and a consultant to review the style revisions. The style subcommittee members analyzed the implications of every proposed change. Three law professors recognized as leading experts in civil procedure – including the advisory committee's reporter, Professor Edward Cooper – reviewed, researched, and revised, providing a reliable basis for the many drafting decisions the project required. The revised draft was submitted to the advisory committee, which divided itself into two subcommittees to subject the proposed style revisions to further study before they were presented to the full advisory committee for review.

This process occurred before the proposed style amendments were published for comment and was repeated to revise and refine the proposals in light of the comments received. The process took two and half years and produced more than 750 documents.

The proposed style rule amendments and the minor, technical "style/substance" amendments were published in February 2005 for approximately ten months for public comment; the proposed style amendments to the forms were published in August 2005 for approximately six months. In addition, copies of the proposed revisions were sent to all major bar groups, including liaisons from each state bar association. Major bar organizations, including the American College of Trial Lawyers and the American Bar Association provided substantial input, both before and after the proposals were formally published. Approximately 25 comments were submitted in the public comment period on the proposed Civil Rules style revisions. Two public hearings were cancelled because no one asked to testify. A third scheduled public hearing on the proposed rules amendments was held at which two witnesses spoke on behalf of a group of practitioners and academics who had reviewed the entire set of revised Civil Rules.

Most of the comments received from the bench, bar, and public were favorable and included some very helpful suggestions that further improved the revisions. Some members of two groups that studied the proposed amendments raised concerns that the changes might create inadvertent substantive changes and would generate satellite litigation. The advisory committee did not view this as a significant problem in light of the extensive work to identify and avoid substantive changes, the fact that the meaning of the rules is inevitably dynamic, and the likelihood that the improvement in simplification and clarity would reduce rather than foment "satellite litigation." Two individuals expressed a concern that the style amendments might supersede any conflicting statutory provisions in effect when the amendments became effective.

The advisory committee studied this issue carefully, noting that this had not been a problem when the Criminal and Appellate Rules were "restyled," concluded that the supersession concern did not raise a significant problem for the Civil Rules style amendments, and recommended a revision to Rule 86 to make the absence of any supersession effect clear.

The Drafting Approaches Used in the Style Project

The style project is intended to clarify, simplify, and modernize expression, without changing the substantive meaning of the Civil Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation; reduced the use of inconsistent and ambiguous words; minimized the use of redundant words and terms; and removed words and terms that were outdated.

Formatting changes made the dense, block paragraphs and lengthy sentences of the current rules much easier to read. The advisory committee broke the rules down into constituent parts, using progressively indented paragraphs with headings and substituting vertical for horizontal lists. These changes make the structure of the rules graphic and make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. The seventy years of adding new rules and amending rules led to inconsistent words and terms. For example, the present rules use "for cause shown," "upon cause shown," "for good cause," and "for good cause shown"; the rules also use "costs, including reasonable attorney's fees"; "reasonable costs and attorney's fees"; "reasonable expenses, including attorney's fees"; and "reasonable expenses, including a reasonable attorney's fee." Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistency by using the same words to express the same meaning. For example,

consistent expression was achieved by changing "infant" in many rules to "minor" in all the rules; from "upon motion or on its own initiative" and variations to "on motion or on its own"; and from "deemed" in some rules and "considered" in other rules to "considered" in all rules. Some variations in expression were carried forward when the context made it appropriate to do so. For example, the words "stipulate," "agree," and "consent" appear in different rules, and "written" qualifies these words in some rules but not others. The advisory committee reduced the number of variations but at times the former words were carried forward to avoid changing substantive meaning. A chart containing the advisory committee's resolution of inconsistent phrases that recur throughout the rules is attached to the text of the proposed restyled rules.

The restyled rules also minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or "should," depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The rules have numerous "intensifiers," expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some of the current rules use the words "the court may, in its discretion." " May" means "has the discretion to"; in its discretion is a redundant intensifier. The absence of intensifiers in the restyled rules does not change their substantive meaning.

Outdated and archaic terms and concepts were removed. For example, the reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. The references to "demurrers, pleas, and exceptions" in Rule 7(c) and to "mesne process" in Rule 77(c) are clearly outdated and have been removed from the style rules.

A number of redundant cross-references were also removed. For example, several rules include a cross-reference to Rule 11, which is unnecessary because Rule 11 applies by its own terms to "every pleading, written motion, and other paper."

The advisory committee declined to make more sweeping changes to the rules that might have resulted in improvements but would have burdened the bar and bench. The advisory committee did not change any rule numbers, even though some of the rules might benefit from repositioning. Although some subdivisions have been rearranged within some rules to achieve greater clarity and simplicity, the advisory committee took care that commonly used and cited subdivisions retain their current designations. The restyled rules include a comparison chart to make it easy to identify redesignated subdivisions. Words and terms that have acquired special status from years of interpretation were retained. For example, there is no revision of the term "failure to state a claim upon which relief can be granted."

Rules Recommended for Approval and Transmission

The advisory committee submitted proposed amendments to Rules 1 through 86 with a recommendation that they be approved and transmitted to the Judicial Conference. Each rule is accompanied by a Committee Note that explains that the rule "has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." The Notes to some rules are more expansive in explaining a particular change.

The advisory committee carefully considered the concern expressed during the public comment period about a possible supersession effect of the style amendments. The supersession provision of the Rules Enabling Act (28 U.S.C. § 2072(b)) provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect."

The concern raised was that although conflicts between the Civil Rules and other laws are admittedly rare, adopting the style rules might generate an argument that all provisions in every Civil Rule have "taken effect" on the date the style rules are promulgated – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date. The advisory committee concluded that this concern lacked foundation. The Civil Rules style project, and the earlier Appellate and Criminal Rules style projects, are not intended to affect the supersession relationships. Nonetheless, the advisory committee believed it useful to state explicitly and clearly in the proposed amendment to Rule 86 that the relationship between the Civil Rules and existing laws is unchanged, to foreclose any supersession argument.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 1 through 86 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed "style" revision of the Federal Rules of Civil Procedure is in Appendix D together with an excerpt from the advisory committee report.

The Style/Substantive Amendments

The advisory committee submitted proposed amendments to Civil Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78 with a recommendation that they be approved and transmitted to the Judicial Conference. These proposed amendments were circulated to the bench and bar for comment in February 2005, along with the comprehensive style revision of the Civil Rules. Two public hearings were cancelled because no one requested to testify. A third scheduled public hearing on the proposed rules amendments was held at which two witnesses spoke, but they directed their comments to the comprehensive style revision of the Civil Rules.

The proposed style/substance amendments are noncontroversial and so minor that if not accomplished in connection with this project, would likely not be made, despite the fact that they improve the rules. An example is the addition of language requiring lawyers to include e-mail addresses as well as telephone and fax numbers. Because these changes, while minor, did or could change substantive meaning, the advisory committee did not include them in the style revision. Instead, it proposed these improvements as a separate "style/substantive" package, to become effective at the same time as the style amendments.

Rule 4 would be amended to delete a statutory citation that is unnecessary in light of an earlier general provision recognizing personal jurisdiction authorized by a federal statute.

Rule 9 would be amended to delete a redundant provision that cross-references Rule 15.

Rule 11 would be amended to require the attorney – or a party if the party is not represented by an attorney – signing a paper to provide an e-mail address if there is one.

Rule 14 would be amended to permit a plaintiff to bring in a third party when either a claim or counterclaim is asserted against the plaintiff, if the rule allows a defendant to do so.

Rule 16 would be amended to permit a party or its representative to attend a pretrial conference by any suitable means, whether by telephone or other communication device with the court's permission.

Rule 26 would be amended to require an attorney – or a party if the party is not represented by an attorney – signing a disclosure or discovery request to provide an e-mail address if there is one.

Rule 30 would be amended to allow a party to arrange transcription of a deposition regardless of the means of recording.

Rule 31 would be amended to require a party who noticed a deposition to notify all other interested parties when it is completed.

Rule 40 would be amended to eliminate unnecessary limitations on local rules governing scheduling of trials.

Rule 71.1 would be amended to require the telephone number and e-mail address of the plaintiff's attorney.

Rule 78 would be amended to delete provisions that have been superseded by provisions in Rule 16.

The Committee concurred with the advisory committee's recommendations.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The style/substantive amendments are proposed to the rules as modified by the style revision project and are in Appendix E together with an excerpt from the advisory committee report.

New Rule 5.2 Implementing E-Government Act and Conforming Amendments to Rule Changes Scheduled to Take Effect on December 1, 2006

The advisory committee submitted proposed new Civil Rule 5.2 and proposed amendments to new Civil Rule 5.1 and amended Civil Rules 16, 26, 33, 34, 37, 45, and 50, which are due to take effect on December 1, 2006, with a recommendation that they be approved and transmitted to the Judicial Conference.

During the extended work on the style project, the Judicial Conference and the Supreme Court approved amendments to several rules to address the discovery of electronically stored information and other issues. The amendments are expected to take effect on December 1, 2006.

Although these proposals used many of the style project drafting guidelines and principles, they were published and approved as amendments to existing rules. Minor revisions are required to incorporate them into the restyled rules and to make them fully consistent with the style project. The amendments were not published for public comment because the advisory committee considered them to be technical or conforming amendments.

The advisory committee proposed new Rule 5.2 to implement the E-Government Act, which is discussed earlier in this report.

The Committee concurred with the advisory committee's recommendations.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 5.1, 16, 26, 33, 34, 37, 45 and 50 and new Civil Rule 5.2 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed revisions to Rules 5.1 and 50 are included in Appendix D with the style rules. For clarity, the revisions to the proposed electronic discovery amendments and new Rule 5.2 are set out in Appendix F, together with an excerpt from the advisory committee report.

The Illustrative Forms

The advisory committee submitted proposed revisions to Illustrative Forms 1 through 35 (to become Forms 1 through 82) contained in the Appendix of Forms to the Federal Rules of Civil Procedure with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed revisions were circulated to the bench and bar for comment in August 2005. The scheduled public hearing on the proposed revisions was canceled because no one asked to testify.

The Illustrative Forms have not been revised or updated for many years. The advisory committee applied the same style conventions and principles to the forms as was used with the

restyled rules. It declined to make changes to the substance of the forms, consistent with its style-project policy, even though some of the forms represent approaches to pleading and other submissions that may not be consistent with current practices. For example, the "complaint" forms call for allegations that are far briefer than are commonly found in cases filed in the district courts. Similarly, the advisory committee did not change the choice of examples in the forms; the "negligence complaint" form continues to use the example of an automobile striking a pedestrian.

The forms have been reorganized and grouped by subject area. The revised forms place "special" forms as Forms 1-9; "complaint" forms as Forms 10-21, "answer" forms as Forms 31-31; "motions" forms as Forms 40-42; "discovery" forms as Forms 50-52; "condemnation" forms as Forms 60-61; "judgment" forms as Forms 70-71; and forms for "assignment to magistrate judges" as Forms 80-82.

The pleading dates in the forms were eliminated and a uniform blank date was substituted. Explanatory Notes were also eliminated, because the forms are intended to stand on their own as simple and brief illustrations.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed revisions to Illustrative Forms 1 through 35 (to become Forms 1 through 82) contained in the Appendix of Forms to the Federal Rules of Civil Procedure and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed revisions to the Illustrative Forms are in Appendix G together with an excerpt from the advisory committee report.

Informational Items

The advisory committee culled a handful of proposals from a lengthy suggestions docket of rule amendments submitted by the bench and bar that has grown over the years. It declined to pursue most proposals and focused attention on seven suggestions for further consideration. It concluded its preliminary work on four proposals and approved amendments to Rules 13, 15, 48, and new Rule 62.1. Rule 15 would be amended to clarify the time allowed to make an amendment as a matter of right. A conforming amendment to Rule 13 was also approved. Rule 48 would be amended to explicitly recognize jury polling after a verdict is returned but before the jury is discharged. New Rule 62.1 would codify the present practice of district courts issuing "indicative rulings" pending appeal. The advisory committee decided to defer requesting publication of these proposals until 2007.

The advisory committee continues to examine suggested changes to Rule 30(b)(6) on depositions of organization witnesses; to the Rule 26 provisions on expert reports; to the provisions in Rule 56 on the procedure for summary judgment motions and decisions, including changes that overlap with a project involving all the advisory committees on calculating time periods under the rules; and to the rules governing pleading standards, particularly Rule 12(e).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 11, 32, 35, and 45, and new Criminal Rule 49.1 and abrogation of Form 9 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in February 2005. Two witnesses testified at the public hearing.

The proposed amendments to Rules 11, 32, and 35 bring them into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Sentencing Guidelines mandatory violate the Sixth Amendment right to jury trial.

Rule 11 would be amended to require the sentencing court to advise the defendant of the court's "obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)" in accordance with *Booker*. The advisory committee carefully considered comments that the proposed amendment: (1) gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the sentencing factors in § 3553(a); and (2) implied that a full-scale guideline calculation was required in every case. It concluded that the proposed amendment captured the approach taken by most courts after *Booker*, which is to first calculate the applicable sentencing-guideline range in determining a sentence, with the possible exception of a sentence in a case involving a calculation that is entirely unnecessary to resolve a particular guideline issue.

Rule 32 would be amended to clarify the court's authority to instruct a probation officer to gather and include in the presentence report any information relevant to the factors in § 3553(a). The request can be made by an individual judge in a particular case or by the court as a whole in a local rule or standing order, requiring information affecting all cases or a class of cases.

The advisory committee withdrew a proposed amendment to Rule 32(h), which would have required the court to notify the defendant that it was considering factors not identified in the presentence report or in the submission of the parties that could result in a departure or a sentence

outside the guideline range. The proposed amendment was intended to avoid unfair surprises to the parties in the sentencing process. Recent case law developments in the area, however, convinced the advisory committee to withdraw the proposal for further study. The proposed amendment to Rule 32(k), requiring courts to use a standard statement of reasons form, had been withdrawn earlier by the advisory committee in light of a recent statutory provision superseding the proposal.

Rule 35 would be amended to remove the restriction on the court's authority to reduce a sentence of a defendant who provides substantial assistance in investigating or prosecuting another person only on condition that the reduced sentence accords with the Guidelines and Sentencing Commission's policy statements. The restriction is stricken as inconsistent with *Booker* because it treats the Guidelines as mandatory.

Rule 45 would be amended to remove any doubt about the method for extending the time to respond after service by mail, by leaving with the clerk of court, by electronic means, or by other means consented to by the party served. The amendment parallels the 2005 change to Civil Rule 6(e). It is unclear whether the additional three days provided in the extant rule are to be added before or after the prescribed period. The amendment makes clear that the three days are added after the prescribed period otherwise expires. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.

Proposed new Rule 49.1 implements the E-Government Act. It was discussed earlier in this report.

The Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue in the Appendix of Forms to the Rules Governing Section 2254 Cases in the United States Courts (Model Form 9) would be abrogated. The abrogation of the form was published in August 2002

with a notice that the advisory committee was planning an extensive revision in the future. The public hearing was cancelled because no one requested to testify.

Model Form 9 was intended to facilitate a court's consideration of a delayed or successive petition filed under Rule 9 of the Rules Governing Section 2254 Cases. Rule 9 was extensively amended in 2004 as part of a general restyling project. The rule was also amended to account for the Antiterrorism and Effective Death Penalty Act of 1996 to delete then subdivision (a) and require the court of appeals to approve a second or successive petition as a condition for proceeding further. As a result, the extant Model Form 9 is out of date, containing references to subdivisions in Rule 9 that no longer exist and including provisions that have been superseded by statute.

The form is no longer useful. Many legal publishing firms do not include it in their publications because it may cause confusion. Most courts have devised a local form, and they have expressed a desire to retain flexibility to adapt their forms to local conditions instead of following a national form.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 11, 32, 35, and 45 and new Criminal Rule 49.1 and abrogation of Form 9 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix H together with an excerpt from the advisory committee.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rule 29 and 41 to be published for public comment.

At its January 2005 meeting, the Committee requested that the advisory committee continue studying a proposed amendment to Rule 29 that would permit a judge to enter a judgment of acquittal before a verdict only if the defendant waives Double Jeopardy rights so that the government's ability to appeal is preserved. It also requested that the advisory committee draft such a rule and submit it to the Committee with a recommendation to either publish or not publish it for public comment. The advisory committee submitted a proposed amendment with a recommendation that it be published for public comment in August 2006.

Rule 41 would be amended to provide procedures for issuing a search warrant for property located in territories and possessions outside the United States. It is intended to address the growing incidences of visa and passport thefts occurring primarily in embassies and premises of consular missions. Public comment is especially sought on the proposed language to exclude American Samoa because of its unique status and separate independent judiciary.

The Committee approved the recommendation of the advisory committee to circulate the proposed amendments to the bench and bar for comment.

Informational Item

The advisory committee is considering a proposed amendment to Criminal Rule 16 that would clarify when and what type of exculpatory evidence and impeachment evidence must be disclosed before trial consistent with *Brady* requirements. The Department of Justice submitted a draft revision of its *U.S. Attorneys' Manual* to accomplish the same goals, in lieu of a rule change. The Department agreed to further modify the *Manual* to respond to specific concerns raised by the advisory committee. The advisory committee expects to review the revised *Manual* in August 2006 and determine whether a rule change is necessary.

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted a proposed new Rule 502 to be published for public comment.

The proposed rule facilitates discovery by limiting the circumstances under which the attorney-client privilege or work-product protection can be forfeited. The burden and cost of preserving the privileged status of attorney-client information and trial preparation materials can be enormous without deriving any countervailing benefit. Under present practices, lawyers and firms must thoroughly review every item produced in discovery. Otherwise they risk waiving the privileged status not only of the individual document disclosed but of all other documents dealing with the same subject matter. The proposed new rule is intended to reduce the risk of forfeiting the privilege or protection so that parties need not scrutinize production of documents in discovery as much as they now do.

Unlike other proposed rule changes, an amendment affecting an evidentiary privilege requires the affirmative approval of Congress under the Rules Enabling Act rulemaking process (28 U.S.C. § 2074(b)). After consultation, the chair of the House Judiciary Committee, Congressman Sensenbrenner, requested the Judicial Conference to proceed with the rulemaking process with an amendment addressing this matter. The advisory committee held a conference at Fordham Law School with a select group of practitioners and academics to review a draft Rule 502 in April 2006. Appropriate changes were made to the draft proposal to account for the suggestions and comments made at the conference. The published proposal also calls for comment on possible rule language that would address selective waivers as part of disclosure to a governmental regulatory or law enforcement agency.

The Committee approved the recommendation of the advisory committee to circulate the proposed new rule to the bench and bar for comment.

Informational Item

The advisory committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which held that if hearsay is "testimonial," its admission against the accused violates the right to confrontation unless the declarant is available and subject to cross-examination. *Crawford* raises questions about the constitutionality of some of the hearsay exceptions as they are applied in the Federal Rules of Evidence. The advisory committee concluded that initiating the rulemaking process to determine the correct scope of the term "testimonial" would be imprudent because any such attempt might be undermined by subsequent case law during the time that the rule would be going through the rulemaking process.

TIME-COMPUTATION PROJECT

The Committee's subcommittee reported on its progress in clarifying and simplifying the time-computation provisions contained in the various sets of federal procedural rules. The subcommittee in consultation with the advisory committees developed a template rule for computing all time periods in each set of rules that would, among other things, eliminate the present method of computing short time periods. Because weekends and holidays would be included in the time computations under the template rule, the respective advisory committees will review the time periods contained in individual rules and determine whether any such rules, especially rules containing short time deadlines, should be revised to provide additional time.

A concern was raised that the proposed template rule would complicate the handling of short deadlines imposed by statute, rather than by rule. The subcommittee is studying the matter.

In light of the advisory committees' comments, the subcommittee decided not to pursue modification of the three-day service rule at this time. The subcommittee will consider how to define inaccessibility of the clerk's office.

LONG-RANGE PLANNING

The Committee was provided a report of the March 13, 2006, meeting of the Judicial Conference's committee chairs involved in long-range planning.

Respectfully Submitted,

David F. Levi

David J. Beck	Mark R. Kravitz
Douglas R. Cox	William J. Maledon
Sidney A. Fitzwater	Paul J. McNulty
Harris L Hartz	J. Garvan Murtha
John G. Kester	Thomas W. Thrash, Jr.
Mary Kay Kane	Charles Talley Wells

Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C – Proposed Amendments to Interim Rule 1007 and Official Forms
Appendix D – Proposed Amendments to the Federal Rules of Civil Procedure
Appendix E – Proposed Style/Substantive Amendments to the Federal Rules of Civil Procedure
Appendix F – Proposed Rule Implementing E-Government Act and Electronic Discovery Conforming Amendments to the Federal Rules of Civil Procedure
Appendix G – Proposed Revisions to the Illustrative Forms in the Federal Rules of Civil Procedure
Appendix H – Proposed Amendments to the Federal Rules of Criminal Procedure