Meeting of January 15-16, 2004
Phoenix, Arizona
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 15-16, 2004. The following members were present:

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

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

Representing the advisory committees were:

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

Also taking part in the meeting were Professors William Henning, Deborah R. Hensler, Lance M. Liebman, and Bruce A. Markell, and attorneys Francis H. Fox, Patricia Lee Refo, and Robert S. Peck.

INTRODUCTORY REMARKS

Judge Levi announced that he was deeply honored to have been selected by the Chief Justice as the new chair of the Standing Committee. He mentioned that he had served on the Advisory Committee on Civil Rules for several years, and he emphasized the importance of having the chairs and reporters of the advisory committees participate in the meetings of the Standing Committee. He said that it is particularly helpful for them to hear first-hand the concerns of Standing Committee members. He added that the Standing Committee has a very good perspective on the overall rules process, and it gives the

advisory committees sound advice, alerts them to potential problems with proposed rules amendments, and improves the quality of proposed amendments and committee notes.

Judge Levi stated that the quality and competence of the members and reporters of the rules committees are truly exceptional, and there is every reason for the Judicial Conference and Congress to have confidence in the thoughtfulness of the deliberations and the eventual quality of rules amendments. He pointed out that the Standing Committee itself, rather than the individual advisory committees, had initiated several rules amendments — particularly with regard to issues cutting across advisory committee lines, such as the local rules project, restyling of the rules, and implementation of the E-Government Act.

He offered special praise for the Style Subcommittee (comprised of Judge Murtha, Judge Thrash, and Dean Kane) and its consultants and staff (Professor Kimble, Mr. Spaniol, and Mr. Deyling). He also expressed gratitude for the many contributions made by the Federal Judicial Center in providing the rules committees with important empirical research to aid their work.

Judge Levi noted that the Standing Committee at its last meeting had celebrated Judge Scirica's achievements as chair of the committee. To follow up at this time, he presented Judge Scirica with a framed resolution, signed by Chief Justice Rehnquist and Administrative Office Director Mecham, honoring the former chair for his distinguished service to the rules committees.

Judge Scirica reflected on his service with the committee. He noted at the outset that his primary concern as chair had been to maintain the productive relationships of the rules committees with Congress, the bar, and the public. He pointed out that the relationship with Congress is defined by the Rules Enabling Act, a contract that has worked exceptionally well over the years. He added that Congress had done the rules committees a favor by amending the Act to mandate that rules committee proceedings be open to the public. This, he said, had enabled the committees to receive and respond to a wide range of public criticism and to deal constructively with the political consequences of controversial rules amendments.

He said that the Rules Enabling Act had been proven to be a superior method for writing procedural law, and he added that he would be hard pressed to suggest improvements in the process. He noted that there will always be some tension between the judiciary and the legislature in rule making, but the Rules Enabling Act channels the tension into a constructive process. He added his wish that members of Congress take the opportunity to observe the rules process first hand and witness the great thought and care that goes into the work of the committees.

Judge Scirica pointed out that Congress had been very responsible in recent years in respecting the Rules Enabling Act and avoiding direct rulemaking by legislation. But, he added, 2003 had been a rough year for the judiciary because of strong Congressional activity in the sentencing area. In addition, Congress had amended the criminal rules directly by legislation as part of the war against terrorism. Although this sort of action raises concerns for maintaining the integrity of the Rules Enabling Act, he concluded that the good relationship with Congress in the area of rules will continue as long as the committees maintain the current level of confidence by producing sound rules and following sound process. He added that Deputy Attorney General Thompson and Assistant Attorney General McCallum had been particularly helpful in working with the committee on these matters.

Judge Scirica reported that the Supreme Court had been very supportive of the committee, and it normally approves proposed rules changes. During his time on the committee, he said, there had only been one instance in which the Court had declined to send a proposed rule to Congress. He explained that the committee chair does not personally discuss the merits of proposed rules with the Court, and he had never received a call from the Court as to the merits of any rules changes. Nevertheless, he added, the Court is provided with a precise summary of all proposed rules changes and a description of any controversies associated with the changes.

Judge Scirica said that the chair of the Standing Committee meets periodically with the Chief Justice to brief him generally on the ongoing work of the committee and to get feedback from him. The meetings, he said, are very cordial and helpful, and the Chief Justice is very interested in the committee's work. He added that all the members of the Court are very much aware of the committee's work.

Judge Scirica said that rules amendments forwarded to the Judicial Conference tend to fall into two broad categories. First, there are the proposed rules changes dealing with areas in which Conference members have little personal familiarity. As to those rules, the Conference generally defers to the experience and expertise of the rules committees.

On the other hand, there are the proposed rules changes dealing with issues and procedures with which all members of the Conference are intimately familiar, such as the discovery rules. He suggested that Conference members tend to react to rules proposals in these areas based on their direct personal experience as judges. They may have developed strong views that are difficult to change. Judge Scirica pointed to the recent amendments to the discovery rules and noted that the amendments had been controversial and had only won Conference approval on a close vote.

Judge Scirica reported that the Chief Justice had advised the committee to proceed with great caution in seeking amendments to the Federal Rules of Evidence and not to proceed with restyling the evidence rules.

Judge Scirica pointed to the important work of the Advisory Committee on Civil Rules in obtaining amendments to FED. R. CIV. P. 23. He noted that class actions give rise to many complex and controversial issues, and he praised Judges Higginbotham, Niemeyer, and Levi for carrying on a meaningful dialog with the bar on Rule 23 and mass torts. He added that the committee had convinced the Judicial Conference to withdraw its opposition to the concept of minimal-diversity legislation, and he suggested that Congress was likely to enact some form of minimal-diversity class action legislation in the coming year.

Judge Scirica noted that the committee was poised to proceed with attorney-conduct rules if it becomes necessary to promulgate them. He added that the committee had completed a great deal of work on proposed rules, but had put them aside until there is a consensus among the Department of Justice, the Conference of Chief Justices, and the American Bar Association to resolve controversial issues dealing with the extent to which state disciplinary rules govern the conduct of federal government attorneys.

Judge Scirica reported that the style project is enormously time-consuming, but it has been one of the most significant accomplishments of the rules committees. He pointed to the successful restyling of the appellate and criminal rules under the leadership of Judges Logan, Garwood, Davis, and Carnes and the support of Professor Schlueter and Mr. Rabiej. He said that it will be much more difficult to restyle the civil rules, but he noted that he had promised the Chief Justice that the job will be exceptionally well done. He added that the project is designed to improve the language and readability of the rules, while avoiding substantive changes in the rules. Nevertheless, he said, some changes in substance may be inevitable, but they should be minor in nature and clearly identified.

Judge Scirica thanked Mr. McCabe and Mr. Rabiej for their dedication and staff support, Professor Coquillette and the other reporters for their expertise and sound counsel, the Federal Judicial Center for its research support, and Professor Hazard for his wisdom and advice. Finally, he thanked Judge Levi as a close friend who will succeed him as chair of the Standing Committee after a distinguished term as chair of the Advisory Committee on Civil Rules.

Following Judge Scirica's remarks, Judge Rosenthal thanked Judge Levi for his deft touch, skill, and good humor and presented him with a resolution thanking him for his work as chair of the advisory committee from 2000 to 2003.

Professor Kimble reported that the Legal Writing Institute, the professional organization of legal writing teachers, had presented its Golden Pen Award to Judge Robert Keeton, former chair of the Standing Committee, for his vision in establishing the project to restyle the federal rules. He pointed out that the members of the current Style Subcommittee had attended the award ceremony for Judge Keeton in Atlanta.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 9-10, 2003.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that Senator Kohl had reintroduced the Sunshine in Litigation Act. Among other things, the bill would prevent a court from approving a settlement agreement that limits disclosure of the agreement unless the court specifically finds that the litigants' privacy interests in preventing disclosure of the agreement outweigh the public's interest in safety and public health. In response to the legislation, he said, the committee had asked the Federal Judicial Center to conduct a study of sealed settlements in the federal courts. He said that the study was not yet complete, but the survey results to date had confirmed that most settlement agreements are neither filed with the court nor require court approval. Center researchers, he explained, had examined 130,000 federal civil cases and had found only 379 cases with sealed settlements.

He said that Professor Steven Gensler, the Administrative Office's Supreme Court Fellow, had reviewed all 379 cases and had concluded that the complaints filed in these cases contain sufficient information to notify the public of any potential public health and safety problems, even though the settlement documents themselves are sealed. Mr. Rabiej reported that a letter had been sent to Senator Kohl informing him of these preliminary findings and promising him an additional response when the Federal Judicial Center study has been completed.

Mr. Rabiej reported that the E-Government Act of 2002 requires the judiciary to promulgate rules under the Rules Enabling Act to protect privacy and security interests when documents are filed with the court electronically.

He reported that the committee and staff had spent a great deal of time on the proposed Class Action Fairness Act. Among other things, the bill would give the federal courts "minimal-diversity" jurisdiction over certain class actions involving plaintiffs from

different states. The House of Representatives had passed its version of the legislation in June 2003 (H.R. 1115, 108th Cong., 1st Sess.), and the Senate was in the process of considering a slightly different version (S. 2062, 108th Cong., 2nd Sess.). He stated that the legislation was very controversial, but it appears that a political compromise had been reached in the Senate on the jurisdictional provisions. He added that the legislation was now likely to pass the Senate, but differences between the House and Senate versions would still have to be worked out.

Mr. Rabiej reported that the committee had persuaded the Senate to eliminate a "plain-English" settlement notice provision in the legislation because it was inconsistent with the December 2003 amendments to FED. R. CIV. P. 23. On the other hand, the legislation still contained an objectionable provision requiring the consent of the plaintiffs before the Judicial Panel on Multidistrict Litigation can allow a case removed into a federal court to be transferred to a different court.

Mr. Rabiej stated that there had been a last-minute attempt by credit-reporting agencies to delay the effective date of the bankruptcy-rule amendments that took effect on December 1, 2003. The amendments were designed to protect the privacy interests of debtors by requiring that only the last four digits of their social security numbers be disclosed. He added that a House of Representatives subcommittee was planning to hold hearings in April 2004 to explore whether the amendments have caused any problems for the credit-reporting industry.

Mr. Rabiej reported that the proposed Bail Bond Fairness Act of 2003 would amend FED. R. CRIM. P. 46 to prohibit a judge from forfeiting a bail bond for any reason other than the defendant's failure to appear before the court as ordered. He said that the House Judiciary Committee had reported out the bill despite opposition from the judiciary and the Department of Justice. He noted that Judge Carnes had testified against the legislation, and Congress had been informed that a national survey of all magistrate judges had shown their strong opposition to the legislation. In addition, Congress had been informed that an examination by ten probation offices of their records had demonstrated that out of 50,000 federal cases reviewed, there had been only 20 in which a bail bond had been forfeited. Judge Carnes added that the legislation was likely to face greater opposition in the Senate Judiciary Committee.

Administrative Report

Mr. McCabe reported that he had reassigned additional staff resources from the Office of Judges Programs to support the work of the rules committees. He thanked the committee for supporting his funding request to upgrade the rules office's electronic document management system to the latest version of the commercial Documentum software. In light of the severe funding crisis facing the judiciary, he said, the committee's

support was crucial, and it appears that money will be provided to upgrade the record-keeping system.

Mr. McCabe also reported that the Statistics Division of the Administrative Office had been transferred into the Office of Judges Programs. He suggested that having the statistics operation and the rules office under the same leadership should open up opportunities to provide better empirical information to assist in the work of the rules committees.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported 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 highlighted three important Center projects: (1) the impending publication of the Fourth Edition of the Manual for Complex Litigation; (2) the development of new case weights for the district courts; and (3) the various efforts underway to support the work of the Advisory Committee on Civil Rules in considering possible amendments to the civil rules to address discovery of electronic documents.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Roberts and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of December 2, 2003. (Agenda Item 5) Professor Schiltz reported that the advisory committee had no action items to present.

Information Items

Amendments to be Presented to the Standing Committee in June 2004

Professor Schiltz pointed out that the committee had approved two items at its last meeting for presentation at the June 2004 meeting of the Standing Committee.

The first is a proposed amendment to FED. R. APP. P. 26(c) that would clarify the means of calculating the three extra days given a party to respond if service has been made by mail, leaving it with the clerk of court, by electronic means, or by other means consented to by the party served. The proposed rule, he said, is substantively the same as the pending amendment to FED. R. CIV. P. 6(e), published in August 2003. He pointed out that the wording of the two provisions is somewhat different, but the appellate rules committee would work with the civil rules committee to harmonize the language.

Professor Schiltz stated that the second provision approved by the advisory committee would amend FED. R. APP. P. 7 to resolve a split among the circuits over whether attorney fees are included among the "costs on appeal" that may be secured by a bond. The proposed amendment would specify that attorney fees are not included.

Amendments Published for Comment in August 2003

Professor Schiltz noted that two of the rules published for public comment in August 2003 were controversial.

FED. R. APP. P. 35

The first controversial provision, he said, deals with en banc voting. Both the governing statute, 28 U.S.C. § 46(c), and FED. R. APP. P. 35(a) provide that a court may hear or rehear a matter en banc by the vote of "a majority of the circuit judges who are in active service." But, he said, there are three different circuit court interpretations of the statute and rule: (1) the "absolute majority" approach, under which there must be an affirmative vote by an absolute majority of all judges on the court (and disqualified judges are counted in the base in determining whether there is a majority); (2) the "case majority" approach, under which there must be a majority of the non-disqualified judges of the court; and (3) the "qualified case majority" approach, under which disqualified judges do not count in the base, but a majority of all judges of the court — disqualified or not — must be eligible to participate in the case.

Professor Schiltz reported that members of the advisory committee had differing views as to the merits of the competing approaches. But, he said, the committee was unanimous in its view that Rule 35 should be amended so that all circuits treat disqualified judges in the same manner under the governing statute and rule. Judge Roberts added that there is no justification for local variations in this area.

FED. R. APP. P. 32.1

The second controversial provision — proposed new Rule 32.1 — would require appellate courts to permit attorneys to cite "unpublished" opinions. Professor Schiltz emphasized that the proposed rule is very limited in scope. It is, he said, only a citation rule, saying nothing about the precedential or binding effect of unpublished opinions or whether there should be unpublished opinions. He pointed out that the rule had attracted a good deal of comment in the legal press, and a letter-writing campaign had been launched against the rule, with the vast majority of comments coming from the 9th Circuit. On the other hand, he noted, there is considerable support and encouragement for the rule from bar groups.

Judge Roberts suggested that much of the opposition to the proposed new Rule 32.1 appears to be based on the fear of a "slippery slope," *i.e.*, that even though the proposed rule does not address the precedential effect of unpublished opinions, the rule inexorably would lead to courts recognizing unpublished opinions as precedent. The proposed rule, however, is very narrow.

Several participants spoke in favor of the proposed new rule and suggested that the traditional distinction between "published" and "unpublished" opinions is no longer meaningful. They argued that the central issue is whether a particular panel opinion will be binding on the entire circuit — since it is the rule of every circuit that a court of appeals can reverse itself only by acting en banc.

There was a clear consensus among the participants that unpublished opinions are very useful and that the committee should take no position on whether unpublished opinions should be given precedent. Several participants argued that many cases do not break new ground or raise serious legal issues. They simply do not merit the attention of a careful, precedential opinion. In fact, they said, the courts of appeals could not function effectively if they were bound by unpublished or non-precedential opinions. The proposed rule, they said, merely permits attorneys to cite these opinions for whatever weight they are worth.

One member cautioned, however, that allowing attorneys to cite unpublished opinions could increase the burdens on lawyers in light of their professional responsibilities to be aware of the decisions of the court and to represent their clients vigorously.

Longer-Range Matters

Professor Schiltz said that the advisory committee also had three longer-term projects on its agenda. The first would address the continuing problem of determining whether an appeal from a particular order involving a hybrid "criminal-civil" matter is an "appeal in a civil case," governed by the deadlines of FED. R. APP. P. 4(a), or an "appeal in a criminal case," governed by the deadlines of FED. R. APP. P. 4(b). He stated that the committee was considering the possibility of amending FED. R. APP. P. 4 to provide a global solution, such as a provision stating that all appeals are to be considered civil appeals, except for direct appeals from criminal convictions — and possibly a few other narrow categories of appeals. One of the participants added that consideration should be given to a provision that "substantial compliance" with either Rule 4(a) or Rule 4(b) should be sufficient, rather than having an inflexible, jurisdictional rule.

The second long-range project being considered by the advisory committee is to explore plugging some gaps in the appellate rules. Professor Schiltz noted, by way of example, that there is no provision in the rules defining who are the parties to an appeal.

He suggested that it is not always clear who the parties are, and some practical problems have arisen that might need to be addressed. He said that the Department of Justice had asked the committee to amend the rules, but there was disagreement on the committee as to the need for an amendment.

As for the third long-range project, Professor Schiltz noted that attorneys continue to complain about local rule variations, particularly with regard to the different local requirements of the circuits regarding briefs. Before proceeding any further, he said, the advisory committee had asked the Federal Judicial Center to report on how many variations are in existence, the history of the variances, and the degree to which the variances are enforced in practice.

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 December 15, 2003. (Agenda Item 6).

Amendments for Publication

Judge Small reported that the advisory committee was seeking authority to publish amendments to two rules.

FED. R. BANKR. P. 5005(c)

Judge Small said that the advisory committee was proposing two minor changes in Rule 5005(c), dealing with errors in filing or transmitting papers. The rule currently provides that if a paper is intended to be filed with the clerk of the bankruptcy court but is mistakenly delivered to the U.S. trustee or several other named officials, it should be transmitted forthwith to the bankruptcy clerk. He pointed out that when the rule was written, the bankruptcy appellate panels had not yet become a national program. Therefore, one of the proposed amendments would add the clerk of the bankruptcy appellate panel to the list of officials named in the rule.

The current rule also provides if a paper is intended to be delivered to the U.S. trustee but is mistakenly sent to the clerk or several other officials, it should be transmitted forthwith to the U.S. trustee. The second proposed amendment would add the clerk of the bankruptcy appellate panel and a district judge to the list of persons who can transmit erroneously filed papers to the U.S. trustee.

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

FED. R. BANKR. P. 9036

Judge Small explained that Rule 9036 (notice by electronic transmission) provides that when a clerk of court, or some other person as directed by court, is required to send notice by mail, the intended recipient can ask that the notice be sent electronically. The rule states that the electronic notice is complete when the recipient receives electronic confirmation that it has been received.

Judge Small pointed out that many internet service providers do not provide an electronic confirmation. This problem prevents potential notice recipients from taking advantage of the rule. The proposed amendment states that electronic notice is complete upon transmission. It would make the rule consistent with FED. R. CIV. P. 5(b)(2)(B) and (D), which specify that service by mail is complete upon mailing, and service by electronic means is complete upon transmission.

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

*Informational Item*s

Judge Small reported that there had been no comments to date on the proposed bankruptcy rule amendments published in August 2003, and the scheduled hearing had been canceled. He said that the advisory committee would present final recommendations on these amendments at the next Standing Committee meeting.

He said that the advisory committee would seek authority at the next meeting to publish additional proposed amendments. Amendments under consideration, he noted, include a controversial proposal by the Executive Office for U.S. Trustees that would require debtors to bring various financial documents to the first meeting of creditors. Another proposal from the U.S. trustees' office would require lawyers for debtors to disclose all attorney fees paid to them by the debtor during the year preceding the filing of the petition. He added that the committee had received many negative comments on the proposals from consumer bankruptcy lawyers, and the advisory committee had appointed a subcommittee to consider the proposal.

Judge Small said that the advisory committee would follow the lead of the civil advisory committee in implementing the E-Government Act of 2002. He noted that the bankruptcy advisory committee had already implemented the Judicial Conference's privacy policy with rule amendments that took effect on December 1, 2003. He also thanked the

Administrative Office for its efforts in averting the attempts to have Congress delay the amendments.

Judge Small also pointed out that if the pending bankruptcy reform legislation were enacted, the advisory committee would be prepared to proceed with interim rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of December 16, 2003. (Agenda Item 7)

Amendments for Publication

FED. R. CIV. P. 16-37 and 45

Judge Rosenthal reported that the Standing Committee had approved publication of the proposed restyling of FED. R. CIV. P. 1-15 at its June 2003 meeting. She said that the advisory committee was now recommending that restyled FED. R. CIV. P 16-37 and 45 be approved for publication in the same package. She added that the advisory committee would return at the next Standing Committee meeting to seek authority to publish additional rules as part of the restyling project.

She explained that the advisory committee had intended to publish the rules in two successive packages in August 2004 and August 2005. But, she said, the restyling process had proceeded so successfully that the advisory committee had reconsidered its plans and was now proposing to publish all the restyled rules in a single package — either in the spring or summer of 2005 — with an expanded public comment period. She noted that a single package would be less confusing for the bench, bar, and public. A 2005 publication date, moreover, would also give the committee additional time to work on rules containing changes that might be considered as more than pure style.

Judge Rosenthal explained that the committee had identified a number of rules in which a proposed change in the current language might alter the meaning and be considered a substantive change. Nevertheless, she said, the change would not be controversial, and it would improve the rule. She suggested that the committee could be subject to legitimate criticism if it failed to make such minor, beneficial improvements as part of the restyling project. But, she added, any potential substantive changes must be clearly labeled as such, and the number of "style-plus" changes must be very limited.

Judge Rosenthal said that the committee had also identified a larger list of more substantive improvements that it would place on its future "reform agenda." These proposed changes would be completely divorced from the style project and would be subject to more intensive analysis. She pointed out, by way of example, that the advisory committee would not propose major changes in Rule 56 as part of the restyling project, but it would consider the rule in depth in the future. She also noted that the advisory committee had, for the most part, retained ambiguities in the current rules, leaving resolution of the ambiguities to the reform agenda.

Judge Rosenthal reported that the procedures being followed by the advisory committee had been borrowed in large measure from those used by the Advisory Committee on Criminal Rules in restyling the criminal rules. She explained that the work begins with a first draft of restyled rules prepared by the Standing Committee's style consultants. Their draft is reviewed by Professors Cooper, Marcus, and Rowe, whose views and comments are captured by Administrative Office staff in an extensive set of footnotes. The style consultants then review the comments of the professors and revise the draft for submission to the Standing Committee's Style Subcommittee. That subcommittee reviews the annotated document in depth and approves a draft for consideration by the Advisory Committee on Civil Rules.

Judge Rosenthal continued that the advisory committee had divided itself into two ad hoc subcommittees, chaired by Judges Russell and Kelly, each of which reviews half the rules. Each subcommittee member takes the lead in analyzing and commenting on a designated number of rules for the subcommittee. The rules are then reviewed and approved by the subcommittee and then by the full advisory committee.

Judge Rosenthal explained that the number of footnotes gets smaller and smaller through the process, as individual concerns are addressed, researched, and analyzed, and decisions are made. Thus, she said, the final, "clean" product presented to the Standing Committee simply does not reflect the enormous amount of work by all concerned and the depth of their analysis.

Judge Rosenthal reported that the advisory committee must also address a list of "global issues." Essentially, these issues concern terms used over and over in the rules, but not in a consistent manner. Conversely, different terms are used interchangeably throughout the rules when no apparent difference in meaning is intended. In addition, she said, the rules are replete with redundancies and needless adjectives, some of which appear to have been inserted deliberately. The advisory committee, she said, was also attempting to make the usage consistent throughout the rules, but it was struggling to avoid making substantive changes as part of the style project.

Professor Cooper reported that the advisory committee had included a standard two-sentence disclaimer in the committee note to each rule declaring that the proposed changes in the language of the rule were intended to be stylistic only. He noted that additional explanation had been included in each committee note whenever a change in language might possibly be interpreted as being something more than pure style. He recited a number of examples from the proposed committee notes explaining that changes were being proposed to correct an obvious drafting oversight, eliminate a gap, avoid uncertainty, eliminate a redundancy, achieve consistency with the language of related rules, or reflect current widespread practice.

Professor Capra suggested that there were certain overlaps and inconsistencies between the civil rules and the evidence rules that needed to be addressed. The civil rules, he noted, retained some evidence remnants left over from the days before the Federal Rules of Evidence came into existence in the 1970s.

Judge Levi suggested that a few of these problems might be resolved quickly and incorporated in the draft of the restyled rules published for public comment. But, he said, other interfaces between the civil and evidence rules were more complicated and substantive. He asked the Advisory Committee on Evidence Rules to review the restyled civil rules very carefully during the public comment period and submit written recommendations to the civil advisory committee. He also asked the Advisory Committee on Bankruptcy Rules to review and submit comments on the rules.

The committee approved publication of restyled Rules 16-37 and Rule 45 by voice vote without objection, subject to the advisory committee presenting additional changes in these rules at the June 2004 meeting.

Informational Items

Rules Published in August 2003

Judge Rosenthal reported that the advisory committee in August 2003 had published proposed amendments to Rules 6, 24, 27, 45 and a proposed new Rule 5.1. She explained that the rules were relatively noncontroversial, and the public hearing had been canceled.

Electronic Discovery

Judge Rosenthal reported that the advisory committee's project to consider rules amendments to deal specifically with the discovery of computer-based information was proceeding very successfully. She noted that the committee would convene a major conference in February 2004 with judges, lawyers, law professors, and computer experts

at Fordham Law School in New York, hosted by Professor Capra. She said that the time had come to consider publishing a package of potential amendments to the discovery rules in light of a newly developing body of case law on electronic discovery, increasing calls from many members of the bar for greater clarification of their responsibilities regarding electronic discovery, and the emergence of standards in this area by bar groups, state courts, and local rules.

She noted that the advisory committee was proceeding very cautiously and was focusing its attention on two threshold questions: (1) whether the existing civil rules are adequate to deal with the problems posed by electronic discovery, and (2) if any rules amendments are needed, what form they should take. She noted that the attendance list for the New York conference included a good balance of practitioners from a wide variety of law practices. In addition, she noted, judges had been invited from federal and state courts having rules in place governing electronic discovery. She said that the conference would be constructed around a series of focused panel discussions addressing such topics as defining what is electronic discovery, addressing electronic discovery issues early in discovery planning under Rules 16 and 26, specifying the form of production of electronic information, defining a party's duty to preserve electronic discovery materials, and protecting against inadvertent privilege waiver.

Civil Asset Forfeiture Provisions

Judge Rosenthal explained that many statutes specify that the supplemental admiralty rules govern civil asset forfeiture proceedings. But the provisions applicable in civil asset forfeiture proceedings are scattered throughout the admiralty rules. Moreover, forfeiture practice presents a number of issues that do not arise in admiralty proceedings.

At the Department of Justice's request, she said, the advisory committee had been working for some time on drafting a new Rule G that would bring together in one place all the present forfeiture provisions of the admiralty rules and add some desirable new provisions. The committee, she noted, had consulted in depth on the proposed Rule G with both the Department of Justice and representatives of the National Association of Criminal Defense Lawyers. She added that the Department had wanted the committee to include in the new rule a provision addressing the issue of the standing required to file a claim, but the committee had decided that the issue was one of substance, rather than procedure.

Sealed Settlements

Judge Rosenthal said that the advisory committee was awaiting a final report from the Federal Judicial Center before deciding whether to consider a possible rule dealing with sealed settlements.

Class Action Legislation

Judge Rosenthal reported that the controversial Class Action Fairness Act might be enacted during the current session of Congress. The legislation, she noted, contained complicated "minimal-diversity" provisions giving the federal courts jurisdiction over many multi-state class actions. She said that a compromise version of the legislation appeared to have been worked out in the Senate, but there were still a number of differences between the Senate and House bills.

She noted, among other things, that the Senate version of the legislation (S. 2062) contained a provision giving a court of appeals discretion to take an appeal from a district court's order remanding a class action. But, she said, once the court of appeals accepts the appeal, it must render a decision within 60 days after the appeal is filed. Several participants argued that the provision was unworkable and should be opposed.

Judge Rosenthal noted that the advisory committee had worked hard on proposed amendments to FED. R. CIV. P. 23, including a provision that would authorize a court to certify a class for settlement purposes only. But, she said, the proposal had been deferred to await the outcome of Supreme Court's decisions in the *Amchem* and *Ortiz* cases. She added that if the pending class-action legislation were not enacted, the advisory committee would likely reconsider the earlier proposals.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachments of December 8, 2003. (Agenda Item 8)

Judge Carnes reported that the public hearing on the rules published for comment in August 2003 had been canceled. He added that the advisory committee had two controversial items on its agenda:

First, the Department of Justice had proposed that FED. R. CRIM. P. 29 be amended to require that a district judge defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. He said that the Department had claimed that some pre-verdict Rule 29 rulings were wrong, but the Department could not appeal the rulings because the Constitution's Double Jeopardy Clause rendered them unappealable. Judge Carnes reported that the advisory committee had voted 7-4 to proceed with further consideration of amending Rule 29, but several committee members had expressed concerns about the effect of an amendment in cases involving multi-count indictments and deadlocked juries.

Second, the American College of Trial Lawyers had proposed amendments to FED. R. CRIM. P. 11 and 16 that would, in effect, supersede the Supreme Court's 2002 decision in *United States v. Ruiz,* involving application of the rule in *Brady v. Maryland* to guilty pleas. He added, though, that it would be unusual for the committee to propose an amendment to the Supreme Court that would overrule one of the Court's decisions so soon after it has been issued.

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 December 1, 2003. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present. But, he said, the committee had given tentative approval to five rule amendments that it would present to the Standing Committee in June 2004 seeking authority to publish. The proposals include amendments to: (1) FED. R. EVID. 404(a) to clarify that character evidence is never admissible to prove conduct in a civil case; (2) FED. R. EVID. 408 to limit the admissibility of evidence of compromise; (3) FED. R. EVID. 410 to protect statements and offers made by prosecutors during guilty plea negotiations to the same extent that the rule currently protects statements and offers made by defendants and their counsel; (4) FED. R. EVID. 606(b) to limit evidence about jury deliberations to the narrow issue of whether there has been a clerical mistake in reporting the verdict; and (5) FED. R. EVID. 609(a)(2) to limit automatic impeachment of a witness's character for truthfulness to convictions involving those crimes that contain a statutory element of "dishonesty or false statement." Professor Capra added that all these proposed amendments had been derived from the advisory committee's project to review conflicts in the case law interpreting the Federal Rules of Evidence.

Judge Smith added that the advisory committee was continuing to study other evidence rules for possible amendments. The committee was also continuing its study of the federal common law of privileges. He emphasized, however, that the committee would not propose amendments to the evidence rules regarding privileges.

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LOCAL RULES PROJECT

Professor Coquillette noted that Congress had been concerned for many years over the number and content of local court rules. The 1988 amendments to the Rules Enabling Act, he said, had entrusted the judiciary with responsibility for monitoring local rules and abrogating those that are inappropriate. He said that the committee had accomplished a

great deal in carrying out this responsibility. Among other things, it had conducted comprehensive studies of the local rules of both the appellate and district courts. It had also amended the federal rules to require that local rules conform to the numbering system of the national rules and that they not duplicate legislation or the national rules.

Professor Coquillette reported that a principal goal of the Local Rules Project was to inform district courts of local rules that may violate the specific requirements of the Rules Enabling Act and FED. R. CIV. P. 83 that such rules be "consistent with," and not be "duplicative of," national law. He said that Professor Capra had carefully reviewed the comprehensive report of Professor Mary Squiers, examining each rule that she had identified as problematic, and he had winnowed down her report considerably. The revised report, he explained, had been approved by the ad hoc Subcommittee on Local Rules, comprised of Judge Fitzwater (chair) and Professors Coquillette and Capra. Accordingly, letters could now be sent to the courts advising them as to the committee's conclusions regarding their local rules.

Professor Capra noted that the revised report had been recast as a report from the Subcommittee on Local Rules to the Standing Committee. He explained that the report identified any local court rules directly in conflict with a national rule or statute. It also listed rules that "arguably conflict" with, or contain "arguably problematic duplication" of, a national rule or statute. But, he added, the report did not address conflicts between local rules and case law, since these lie outside the scope of Rule 83.

Professor Capra said that the subcommittee would make a final check to make sure that all the local rules in the study are up to date, and it would make appropriate stylistic changes in the report and address it directly to the district courts. Individualized cover letters would be sent to each court, including courts that do not have any conflicting rules. Finally, he added, the letters would contain a disclaimer cautioning that the national study had not in fact addressed every rule. He explained, by way of example, that the study had not researched local rules implementing FED. R. CIV. P. 19 or 23.

The committee approved sending the local rules report and appropriate cover letters to the district courts.

IMPLEMENTING THE E-GOVERNMENT ACT

Judge Fitzwater reported that section 205(c) of the E-Government Act of 2002 requires the Supreme Court to promulgate rules under the Rules Enabling Act to protect privacy and security concerns relating to electronic filing of court documents and the availability of court documents filed electronically. The rules, he said, must provide

uniform treatment of privacy and security concerns throughout the federal courts. They must also take into consideration the best privacy and security practices both in the federal and state courts and must permit parties to file unredacted documents with the court under seal.

Judge Fitzwater explained that Judge Levi had appointed a special subcommittee, including representatives from the Court Administration and Case Management Committee and observers from the Criminal Law Committee and Information Technology Committee, to begin work on drafting the required new federal rules. The advisory committee reporters would also serve on the subcommittee, with Professor Capra taking the staffing lead.

Judge Fitzwater added that the subcommittee had met the day before the Standing Committee meeting and had agreed that Professor Capra would draft a template rule, which he would circulate to the reporters of the other advisory committees. They, in turn, would tailor the template to fit the requirements of their respective rules. Thus, through the regular advisory committee process, each committee would consider proposed rule amendments at their next two meetings and present proposed rule amendments for publication at the June 2005 meeting of the Standing Committee.

Professor Capra explained that the template would be based on the model local rule drafted by the Court Administration and Case Management Committee and approved by the Judicial Conference. The model rule, he noted, requires that certain personal identifiers be deleted from papers filed with the court. It also contains a good deal of hortatory advice to attorneys cautioning them not to include objectionable materials and identifiers in their case filings. The subcommittee, however, had agreed that such cautions should be placed in committee notes, rather than a proposed federal rule.

ATTORNEY CONDUCT

Professor Coquillette reported that the committee's extensive efforts in considering potential attorney conduct rules have been placed on indefinite hold. He noted, however, that the committee would be ready to respond quickly if Congress were to enact legislation calling for the judiciary to initiate attorney conduct rules and if the Department of Justice, the Conference of Chief Justices, and the American Bar Association were to agree on the substance of the proposed rules.

PANEL DISCUSSION ON LAW REFORM

Professor Hazard, a former member of the Standing Committee, had been asked by Judge Levi to moderate a panel discussion with distinguished representatives of leading organizations engaged in law-reform efforts and conducting empirical studies on the work of the courts. Professor Hazard explained that the rules committees themselves had been deeply involved for several years in law-reform projects in such cutting-edge areas of the law as class actions, mass torts, and civil discovery. In pursuing these reforms, he said, the committees had relied on a number of empirical studies, and they had regularly solicited the views of the bar and interested organizations. He added that it would be very beneficial for committee members to learn more about the work of other organizations engaged in law-reform work, particularly their current and future projects.

The panelists described briefly the work of their respective organizations and responded to questions. Speaking in turn were:

1. Professor Deborah R. Hensler
2. Professor William Henning
3. Robert S. Peck, Esquire
4. Professor Bruce A. Markell
5. Patricia Lee Refo, Esquire
6. Professor Lance M. Liebman
7. Francis H. Fox, Esquire

1. Professor Hensler

Professor Hensler of Stanford Law School described some of her more significant projects, both in her present academic capacity at Stanford and as former director of RAND's Institute for Civil Justice.

She emphasized the importance of research on asbestos litigation, noting that RAND had been studying the area since the 1980s and would soon issue a final report on its pending asbestos project. She pointed out that two important areas of inquiry had been deferred in light of the pending negotiations regarding enactment of comprehensive asbestos legislation in Congress: (1) a study of actual recoveries by plaintiffs in asbestos litigation over the past 30 years; and (2) a review of the policy options on asbestos litigation from a public policy perspective. In response to questions, she responded that transaction costs have changed over the years, and the only efficient means of delivering asbestos relief to victims today is in the bankruptcy courts, where the transaction costs are relatively low. She added that more than 90% of asbestos claims filed today are based on x-ray evidence of exposure to asbestos, rather than on actual injuries.

She reported that research was proceeding on the impact of consolidating claims in asbestos litigation, including cases that have proceeded to jury verdict. She noted that most of the cases that have gone to trial have been tried in manageable groups of claims, rather than in mass trials. She said that good information can be derived from the experience of these cases as to whether plaintiffs will win at trial and how much they will recover. She stated that the results of this research will be included in the forthcoming RAND asbestos report and that the methodology used to examine asbestos cases would be used to examine other categories of mass tort cases.

Professor Hensler said that research had been initiated to compare the ways in which the common law and civil law judicial systems address mass tort cases, including an analysis of the roles that judges play in handling these cases. She noted, for example, that much of the judges' work in these cases has been administrative in nature, rather than purely judicial. She added that the research is addressing what substantive decisions judges make and what are the bases for those decisions.

Professor Hensler added that she was increasingly convinced that more attention needs to be paid to mass-tort developments occurring outside the United States. She noted that virtually every judicial system is addressing the practical and legal problems of handling large numbers of similar claims. There are, she said, a number of different approaches being used around the world to aggregate litigation.

2. Professor Henning

Professor William Henning of the University of Alabama Law School described a number of projects undertaken by the Conference of Commissioners on Uniform State Laws, which drafts substantive laws for consideration by the states. He spoke of proposed apportionment-of-fault legislation that would establish thresholds of fault before liability attaches, noting that the legislation contains provisions for reallocating fault if one of the defendants becomes insolvent or otherwise leaves the litigation. He noted that the legislation had the endorsement of the American Bar Association's Tort Trial and Insurance Practice Section, but had not been well received by the states.

He referred to the work of the Conference's Liaison with Native American Tribes Committee in adapting parts of the Uniform Commercial Code for enactment by Indian tribes to assist them in their economic development. He also described projects to draft bankruptcy-related legislation and to address a number of difficult evidence problems, such as the taking of child-witness testimony by alternative means. He also pointed out that the Conference was exploring issues arising from computer-generated demonstrative evidence, but he noted that the courts appear to be handling the evidence problems very well under the current evidence rules. He also noted that the Conference had begun projects to revise state Administrative Procedure Acts and to study internet privacy law.

3. Mr. Peck

Mr. Peck described some of the initiatives undertaken by the American Trial Lawyers Association. He explained that the organization had been concerned for some time about "secret settlements" and the potential adverse impact that undisclosed information contained in settlements may have on public health and safety. He noted that the association was attempting to gather data on settlements and to test the validity of the argument that recent court rules prohibiting sealed settlements will have a chilling effect on settlements. He stated, by way of example, that there is no indication that settlements have decreased in number since enactment of Florida's sunshine law, which makes court documents and settlements public.

Mr. Peck reported that ATLA had begun initiatives in the last few months to study the impact of summary judgment in the federal and state courts and to look at discovery abuse. He said that there had been an increasing number of complaints by ATLA members that some parties refuse to produce even garden-variety discovery materials. Some judges, he said, may not be making full use of their authority to prevent discovery abuse. Moreover, he noted, litigation seems to be increasing as to the meaning of the recent civil discovery rules amendments, which limit the scope of automatic discovery and require parties to ask the court for additional discovery. He said that the amendments have had an impact on civil practice, in that more discovery motions are being filed, almost every motion is hotly contested, and motions for sanctions appear to be on the increase.

Finally, Mr. Peck emphasized that ATLA is deeply concerned both about growing political attacks on judicial independence and the serious budget problems facing in the state courts.

4. Professor Markell

Professor Markell of the William S. Boyd School of Law at the University of Nevada, Las Vegas, spoke about the work of the National Bankruptcy Conference, an organization established in the 1930's to assist Congress in drafting the bankruptcy laws. He reported that two major areas of current interest to the Conference are asbestos litigation and international bankruptcies.

He pointed out that until Congress enacts comprehensive legislation addressing asbestos injuries, most asbestos claims will be handled in the bankruptcy courts. He noted that the number of asbestos cases will tend to increase as additional categories of cases are initiated and additional defendants are sued. He explained that Congress had amended the Bankruptcy Code in 1994 to add special provisions for asbestos cases, but the changes had not worked out particularly well in practice. He added that the National Bankruptcy Conference had developed a series of proposed solutions to fix the problems of dealing

with asbestos cases in the bankruptcy courts, including a proposed statutory amendment to authorize the appointment of representatives in bankruptcy cases to protect the interests of future claimants.

In response to a question regarding the relationship between civil and bankruptcy litigation, Professor Markell said that the bankruptcy system can be very efficient in distributing money, but the main difficulty in resolving the asbestos problem is that there is not enough money available to pay all potential claimants very much. He stated that defendant corporations and their insurance companies find the bankruptcy system attractive because it allows them to avoid further litigation generally by contributing a good deal of money. The same comfort level, however, does not apply in civil litigation. He added, though, that even in bankruptcy the problem of finality of judgment as against future claimants will continue to exist unless Congress enacts legislation establishing an administrative system. Professor Morris added that the focus in bankruptcy is not just on the victims. The bankruptcy court must consider the viability of the reorganization of the debtor and take into account the claims of trade creditors and other creditors.

Professor Hensler cautioned about the need to distinguish asbestos claims from other mass torts because asbestos has a multi-decade latency period that has led to many of the current legal problems — particularly in identifying potential claimants who have been exposed and in estimating potential damages. She said that asbestos injuries would continue for the next 30 years or so. She added, though, that, other than tobacco, it would be hard to think of another mass tort that would raise all the same problems as asbestos.

Professor Markell added that there has been a shift in the law of many states regarding liability. Fear of exposure, for example, is not a tort under some state laws. He added that the law of successive liability is also being tested in the states.

Professor Markell also reported that the National Bankruptcy Conference had worked with the International Insolvency Institute and the American College of Bankruptcy in cosponsoring a project to deal with the growing tide of bankruptcies that cross national borders. Among other things, he said, the project would try to develop a series of international principles and procedures that would apply in bankruptcy cases.

5. Ms. Refo

Ms. Refo, chair of the Litigation Section of the American Bar Association and a member of the Advisory Committee on the Evidence Rules, described a number of law-reform efforts undertaken by the Litigation Section. She pointed to the Vanishing Trial Project and its December 2003 conference in San Francisco, at which professors, judges, and lawyers explored the various reasons why trials on the merits have been decreasing

steadily. Among other things, she noted, the participants had discussed the impact of summary judgment, the diversion of cases to alternate dispute resolution, and the risks and costs of going to trial. She explained that the Section had commissioned Professor Mark Galanter of the University of Wisconsin Law School to prepare a comprehensive workbook containing extensive empirical data and analysis to document the decline of trials in both civil and criminal cases. She said that several scholarly papers had been produced for the San Francisco conference, which would be published together in an upcoming law review issue.

Ms. Refo emphasized that the San Francisco conference had not addressed whether the decline in trials was a good thing or a bad thing. Rather, she said, the participants focused on documenting the phenomenon and exploring the reasons why it is occurring. She pointed out that there had been a clear consensus among the participants that the key factor behind the decline in trials in criminal cases in the federal courts is the impact of the Federal Sentencing Guidelines, which induce defendants to plead guilty.

Ms. Refo stated that there had also been a consensus among the participants at the conference that additional, more refined court data are needed to facilitate further research and analysis. She emphasized that the Litigation Section would very much like to be involved in the formulation of new data. Professor Hensler added that she had participated in the conference, and it had prompted her to consider additional research into the reasons why fewer cases are going to trial.

Ms. Refo reported that the ABA was working on drafting a set of standards for mediators and a set of standards addressing electronic discovery issues. It was also updating its trial handbook.

She noted that the ABA was particularly concerned about the serious funding crisis facing many state court systems, viewing it as an attack on the independence of the judiciary. Finally, Ms. Refo reported that the new president of the Association had made the American jury the centerpiece of his presidency, and that she would chair the initiative, and Justice O'Connor would serve as honorary chair.

6. Professor Liebman

Professor Liebman of Columbia Law School, director of the American Law Institute, described a number of projects being undertaken by the ALI, including: (1) conducting a study of the law of complex litigation; (2) developing a set of basic international principles and rules for civil procedure; (3) recommending amendments to the federal judicial code regarding venue, supplemental jurisdiction, and removal; (4) drafting proposed federal legislation to govern enforcement of international judgments and intellectual property judgments; and (5) studying aggregated and consolidated litigation.

7. Mr. Fox

Mr. Fox, a former member of the Advisory Committee on Civil Rules, described the current work of the American College of Trial Lawyers. He pointed out that the College was exploring ways to make the offer-of-judgment procedure in FED. R. CIV. P. 68 more useful, and it was conducting a survey of the many different offer-of-judgment procedures used in the state courts.

The College, he said, was following closely the work of the Advisory Committee on Civil Rules in considering amendments to the rules to deal with discovery of computer-generated materials. He emphasized that the organization had not reached a consensus as to whether specific amendments were needed to the Federal Rules of Civil Procedure. Rather, it was examining the area from a practical point of view, *i.e.*, to provide guidance to lawyers on how to handle electronic discovery efficiently and ethically.

Mr. Fox reported that the College had studied the area of mass torts for a considerable amount of time and had developed a very practical manual for lawyers that may also be made available to judges. In addition, he said, the College had been studying alternate dispute resolution in depth.

Mr. Fox pointed out that the Criminal Law Committee of the College would soon publish the results of a study on implementation of the rule in *Brady v. Maryland*, which requires prosecutors to produce evidence favorable to the defense. He said that the committee would propose rule amendments that would define the term "favorable information," impose a due diligence requirement on government attorneys to search for it, and establish time limits for the government to disclose it to the defense.

Finally, Mr. Fox reported that a special task force of the College was examining the federal Sentencing Guidelines and the "Feeney Amendment," which requires the courts to report downward sentencing departures to the Department of Justice.

Mr. Cecil stated that there are many opportunities for the Federal Judicial Center to collaborate and share information in connection with these various projects. He described a pending study by the Center on summary judgment in the federal courts, and he noted the Center's continuing interest in alternate dispute resolution. One of the participants noted that there is considerable interest in the bar as to whether courts are applying summary judgment properly, and he suggested that additional research into summary judgment would be very valuable. Another participant noted that it is very difficult to prevail on summary judgment in the state courts. Yet, he said, plaintiffs do not appear to be voting with their feet by staying out of the federal courts in diversity cases to avoid summary judgment.

Mr. Cecil said that the American Bar Association's new initiative on jury trials might lead the Center to conduct a study of jury trials in the federal courts. He also emphasized the high priority that the Center had placed on international law and issues dealing with science and the law.

Mr. Peck expressed concern that several segments of society are opting out of the judicial process entirely. He pointed to the growing use by businesses of contract clauses that mandate arbitration. He asked whether there were any reliable studies as to whether arbitration is, as its advocates have claimed, more efficient and less costly. To the contrary, he said, some participants at the recent Vanishing Trial conference had asserted that arbitration is, in fact, more costly than the judicial process.

Professor Hensler responded that there are no reliable data currently available that measure the cost consequences of using binding arbitration in contractual disputes. She added that it would be very difficult to conduct such a study, although it is possible that some corporations might have conducted their own internal analyses. At most, she said, there would be a scattering of survey data that would be of questionable validity. She added that there are some data on the frequency of arbitration clauses in consumer contracts and employee contracts, but it is a moving target as the states move to amend their laws to address concerns about unconscionable provisions.

One of the participants noted an internal study of an industry that commonly uses arbitration clauses in its contracts. The study found that about 90% of all its cases in the courts settle before trial, but only 45% of its arbitration cases settle. Industry parties, moreover, lose twice as frequently in arbitration as in court proceedings. Nevertheless, he said, the damages awarded by arbitrators were found to be in a much tighter range than those rendered in court cases. In other words, there were very few "outliers" in awards by arbitrators compared to court cases. Moreover, some jury verdicts were seen as clearly excessive. The study, thus, concluded that parties who opted for arbitration were essentially opting for less uncertainty as to the amount of damage.

Ms. Refo added that this result was consistent with statements made at the Vanishing Trial symposium. Lawyers, she said, asserted that they could project reasonably well what an "average" verdict would be if a case went to trial. But they simply could not project whether their case would be the outlying case. That unpredictability, she said, seemed to be encouraging settlements and the use of arbitration.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 17-18, 2004, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary