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 11-12, 2007. All members attended.

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 and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office; Joe Cecil of the Federal Judicial Center; and Professor R. Joseph Kimble and Professor Geoffrey C. Hazard, consultants to the Committee. Also in attendance were Alice S. Fisher, Assistant Attorney General of the Criminal Division, and Ronald J. Tenpas, Associate Deputy Attorney General, Department of Justice.

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

TIME-COMPUTATION PROJECT

Two years ago, the Committee created the Time-Computation Subcommittee and asked it to examine the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules, with a view to simplifying those provisions and eliminating inconsistencies among them. The project was launched in response to frequent complaints by practitioners about the time and energy expended in calculating time periods, and to comments by judges about the anomalous results of the current computation provisions.

The subcommittee, in consultation with the advisory committees and the Committee, drafted a proposed template for an amended time-computation rule that would be consistent across the federal procedural rules. The template's principal simplifying innovation is its adoption of a "days-are-days" approach to computing all time periods. Under some of the current rules, intermediate weekends and holidays are omitted when computing short periods but included when computing longer periods. By contrast, under the template rule, intermediate weekends and holidays are counted regardless of the length of the specified period. The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules adopted the template with limited, appropriate modifications to account for differences in each set of rules.

The advisory committees also reviewed each set of rules to ensure that the time periods, including those affected by the template rule, were reasonable. The advisory committees concluded that virtually all short time deadlines should be extended to adjust for the effect of including intermediate weekends and holidays in calculating the time periods. To further simplify time-counting, the advisory committees changed most periods of less than 30 days to multiples of 7 days. The committees adopted 7, 14, 21, and 28-day periods whenever possible, so that deadlines will usually fall on weekdays, avoiding the need to consider weekends. The result in virtually every rule was to increase the existing time periods, for example, from 10 days

to 14 days. Periods longer than 30 days did not present the same time-calculation difficulties as shorter periods and were not changed. The advisory committees' comprehensive review of all rules containing a time period resulted in proposed amendments to a total of 91 rules.

Other changes proposed by the template rule clarify how to count forward when the period measured is after an event and the deadline falls on a weekend or holiday, for example, 20 days after service of a motion; and how to count backward when the period measured is before an event and the deadline falls on a weekend or holiday, for example, 10 days before a scheduled hearing. The proposed template rule also provides for the computation of hourly time periods to address recent legislation that provides, for example, 72 hours for action.

The proposed template rule also addresses the special timing considerations that accompany electronic filing. Under the proposal, unless a statute, local rule, or court order provides otherwise, the last day of a period for an electronic filing ends at midnight in the court's time zone, while the last day for a paper filing ends when the clerk's office is scheduled to close. Filing deadlines are presumptively extended if the clerk's office is inaccessible. The proposed template rule provides a court with more flexibility to define the meaning of "inaccessibility," which can vary depending on whether a filing is electronic or paper. Neither the proposed template rule nor the Committee Note specifies the meaning of "inaccessibility," leaving such definition to local rules and case law as they may develop in particular cases in light of local practices and conditions. Thus, a local rule could, for example, prescribe the effect of severe weather on filing deadlines, which might be different in a rural district than in a compact urban district.

The proposed amendments to Appellate, Bankruptcy, Civil, and Criminal Rules containing the template rule and the changes to time periods in individual rules will be published in August 2007.

Moreover, the time-computation provisions in the procedural rules also generally apply to statutory time periods affecting court proceedings. If such a statute contains a short time period that is computed using the approach of excluding intermediate weekends and holidays, applying the template rule could shorten the period. The advisory committees will seek legislation to extend some short time deadlines, such as five or seven days, contained in statutes that affect court proceedings, to adjust for the change in the time-computation rules. The advisory committees will work with the Department of Justice and the Congressional Research Office to identify statutes in which such a change could be helpful. It is hoped that the rules amendments and legislation can be synchronized so that both take effect on December 1, 2009.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed amendments to Rules 4, 22, 26, and 40, and a new Rule 12.1 with a recommendation that they be published for comment.

The advisory committee also recommended publishing proposed rule amendments as part of the time-computation project discussed above. The proposed amendment to Rule 26 is based on the template rule for computing time periods in a consistent way across the federal procedural rules. Changes to the time periods in 15 Appellate Rules are proposed, including Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41.

The proposed amendment to Rule 4 eliminates an ambiguity, arising from the 1998 restyling of the Appellate Rules, which might be construed to require an appellant to amend a notice of appeal filed before a district court amends the judgment, even if the amendment favors the appellant. The amendment also makes clear that the 60-day appeal period applies in a case in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

The proposed amendment to Rule 22 conforms the rule to changes proposed to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § § 2254 or 2255.

The proposed amendment to Rule 26, in addition to the changes made to adopt the template rule, clarifies the operation of the three-day rule when a time period ends on a weekend or holiday.

Rule 40 would be amended to make clear that the 45-day period to file a petition for panel rehearing applies in a case in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

Proposed new Rule 12.1 sets out procedures reflecting the practice of most courts to permit a party to request an "indicative ruling" on a posttrial motion if relief in the district court is sought during the pendency of an appeal. The proposed procedures ensure proper coordination of proceedings dealing with indicative rulings in the district court and court of appeals.

The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

***Informational Item*s**

In 2006 the advisory committee requested each court of appeals to review its briefing requirements. The committee emphasized the need to make those requirements readily accessible to practitioners and urged each circuit to consider whether its briefing requirements are necessary. To date, eight circuits have responded. The remaining circuits continue to study the issue.

The committee decided to defer consideration of an amendment designed to conform Rule 4 to changes proposed to Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

The committee also decided to defer consideration of a proposed amendment to Rule 29, which is modeled on Supreme Court Rule 37.6. The proposed amendment requires a notice in every amicus brief (except those filed by certain government entities), indicating whether a party's counsel had any role in authoring the brief and identifying any person or entity who contributed financially to the brief's preparation or submission.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to 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, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024; proposed new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011; proposed revisions to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9, A-I, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, 24; and proposed new Official Forms 25A, 25B, 25C, and 26 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and new rules (with the exception of technical amendments to Rules 7012, 7022, 7023.1, and 9024), and Official Forms were circulated to the bench and bar for comment in August 2006. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

In August 2005, the Executive Committee, on recommendation of this Committee, authorized distribution to the courts of Interim Bankruptcy Rules with the recommendation that they be adopted to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of

2005 (“Act”), which generally became effective on October 17, 2005 (Pub. L. No. 109-8). Most of the amendments and new rules proposed to the Bankruptcy Rules are based on the Interim Rules, which were adopted by virtually all bankruptcy courts in local rules or general orders until final rules could be put in place to implement the Act. Based on the favorable experience of the bench and bar with the Interim Rules, the proposed amendments to the national rules use the Interim Rules language, with only slight adjustments to certain rules. A handful of additional amendments and new rules, which were not included in the Interim Rules, are also proposed to address provisions of the 2005 Act that did not require immediate implementation.

The proposed amendment to Rule 1005 (Caption of Petition) requires a debtor to disclose all names or aliases used by the debtor in the past eight rather than six years. The amended rule also requires disclosure of the last four digits of an individual debtor’s taxpayer-identification number in the title of a case.

The proposed amendment to Rule 1006 (Filing Fee) directs the debtor in a chapter 7 case to use the appropriate Official Form to apply for a filing fee waiver.

The proposed amendment to Rule 1007 (Lists, Schedules, Statements, and other Documents; Time Limits) requires a debtor to file a variety of documents mandated under the Act. The amendment limits the extension of time that may be granted to a small-business debtor to file schedules and statements. The amendment also requires a debtor filing a petition to commence a case under chapter 15 to include a list of entities with whom the debtor has been engaged in litigation in the United States.

The proposed amendment to Rule 1009 (Amendments of Voluntary Petitions, Lists, Schedules, and Statements) corrects a cross-reference to the Code.

The proposed amendment to Rule 1010 (Service of Involuntary Petition and Summons; Petition For Recognition of a Foreign Nonmain Proceeding) requires a representative in a

pending foreign nonmain proceeding to serve a summons and petition on the debtor and any entity against whom the representative is seeking provisional relief.

The proposed amendment to Rule 1011 (Responsive Pleading or Motion in Involuntary and Cross-Border Cases) requires a corporation involved in a cross-border insolvency case to file a corporate disclosure ownership statement. Other provisions are amended to conform to the new proceedings governing chapter 15.

The proposed amendment to Rule 1015 (Consolidation or Joint Administration of Cases Pending in Same Court) conforms the cross-references to renumbered § 522 of the Code.

The proposed amendment to Rule 1017 (Dismissal or Conversion of Case; Suspension) permits a party in interest to move to dismiss a chapter 7 consumer-debt case as abusive, if the party states with particularity the circumstances of the alleged abuse.

The proposed amendment to Rule 1019 (Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case) preserves deadlines for motions to dismiss a case under § 707(b) upon conversion from chapter 13 to chapter 7.

The proposed amendment to Rule 1020 (Small Business Chapter 11 Reorganization Case) replaces the old rule and provides procedures to determine whether the debtor is a small business. A party objecting to the small-business designation must file objections within a limited time period.

Proposed new Rule 1021 (Health Care Business Case) provides procedures for designating a debtor as a health-care business, including procedures authorizing a party in interest to object to the designation.

The proposed amendment to Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in

Ancillary and Other Cross-Border Cases, United States, and United States Trustee) requires a court promptly to provide all creditors a copy of the trustee's statement as to whether the debtor's case will be presumed to be abusive. The amendment also requires the court to provide notice of a hearing on a petition for recognition of a foreign proceeding. The notice must be provided to a debtor and entities against whom provisional relief is sought. Other proposed rule changes implement the Act's amendments to the business provisions of the Bankruptcy Code.

The proposed amendment to Rule 2003 (Meeting of Creditors or Equity Security Holders) authorizes a court to order that a meeting of creditors need not be convened if the debtor has already solicited acceptances of a plan prior to commencement of a case.

The proposed amendment to Rule 2007.1 (Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case) requires an elected trustee to file an affidavit setting forth information regarding that person's connection with creditors and others with an interest in the case.

Proposed new Rule 2007.2 (Appointment of Patient Care Ombudsman in a Health Care Business Case) requires the appointment of a patient-care ombudsman in the first 30 days of a health-care business case unless the court finds it is not necessary for the protection of patients. The new rule also establishes procedures for a party in interest to file a motion to appoint, terminate, or object to the appointment of an ombudsman.

The proposed amendment to Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status) requires a small-business chapter 11 debtor to file periodic financial and operating reports. It also requires a foreign representative to file a notice of a change in status in the foreign proceeding or in the appointment of the foreign representative.

Proposed new Rule 2015.1 (Patient Care Ombudsman) establishes notice requirements concerning reports issued by a health-care ombudsman. The rule requires that any request by the

ombudsman to review patient records must be approved by a court. It also provides an opportunity to the trustee, patient, and other interested persons to object to the ombudsman's request.

Proposed new Rule 2015.2 (Transfer of Patient in Health Care Business Case) authorizes a trustee to relocate patients when a health-care debtor business is being closed. Patients are provided an opportunity to object to the trustee's relocation determination.

Proposed new Rule 2015.3 (Reports of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest) requires 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 or controlling interest.

The proposed amendment to Rule 3002 (Filing Proof of Claim or Interest) provides additional time for a governmental unit to file a proof of claim for tax obligations with respect to tax returns filed during the pendency of a chapter 13 case, which conforms to the new time period required by the Act. Under the amendment, a court may extend the time for filing a proof of claim for a creditor with a foreign address.

The proposed amendment to Rule 3003 (Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases) provides that a court may extend the time for a creditor with a foreign address to file proofs of claim in a chapter 9 or 11 case.

The proposed amendment to Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case) provides that a small-business debtor need not file a disclosure statement if the plan includes adequate information and a court finds that a separate disclosure statement is unnecessary.

The proposed amendment to Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case) permits a court in a small-business chapter 11 case to conditionally approve a plan if adequate information is provided.

The proposed amendment to Rule 3019 (Modification of Accepted Plan Before or After Confirmation in a Chapter 9 Municipality or Chapter 11 Reorganization Case) establishes a procedure for filing and objecting to a proposed modification of a confirmed plan in an individual debtor's chapter 11 case.

The proposed amendment to Rule 4002 (Duties of Debtor) requires a debtor to provide a government-issued picture identification and evidence of a social security number, current income, recent Federal income tax returns or tax transcripts, and financial accounts existing when the case commenced.

The proposed amendment to Rule 4003 (Exemptions) allows a trustee to object to an exemption at any time up to one year after the closing of a case if the exemption was fraudulent. The amendment also conforms the rule to § 522(q) of the Code, as revised by the Act, which limits the state homestead exemption to $138,875 if the debtor had been convicted of a felony or owed a debt arising from certain causes of action.

The proposed amendment to Rule 4004 (Grant or Denial of Discharge) requires a debtor to complete a financial management program before the court may enter a discharge, and authorizes the court to postpone a discharge to determine whether the debtor has committed a felony or owes a debt arising from certain causes of action within a particular time frame.

The proposed amendment to Rule 4006 (Notice of No Discharge) requires the clerk to provide notice to all parties in interest, including the debtor, that no discharge was entered.

The proposed amendment to Rule 4007 (Determination of Dischargeability of a Debt) provides the time limits governing the filing and notice of a complaint to determine the dischargeability of a debt under § 532(c) of the Code in a chapter 13 case.

The proposed amendment to Rule 4008 (Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement) establishes a deadline for filing a reaffirmation agreement. The amendment also requires a debtor to file a signed statement showing total income and expenses from schedules I and J and an explanation of any discrepancies from the debtor's income and expenses at the time of the filing of the reaffirmation agreement.

The proposed amendment to Rule 5001 (Courts and Clerks' Offices) authorizes a bankruptcy judge in emergency situations to hold hearings outside the district in which the case is pending under 28 U.S.C. § 152(c).

The proposed amendment to Rule 5003 (Records Kept By the Clerk) allows government-taxing authorities to designate addresses to use for the service of a request under § 505(b)(1) of the Code.

Proposed new Rule 5008 (Notice Regarding Presumption of Abuse in Chapter 7 Cases of Individual Debtors) requires a clerk to give written notice to all creditors no later than 10 days after the filing of a petition that a presumption of abuse has arisen.

The proposed amendment to Rule 6004 (Use, Sale, or Lease of Property) requires the appointment of a consumer-privacy ombudsman if a trustee proposes to sell personally identifiable information in certain circumstances.

Proposed new Rule 6011 (Disposal of Patient Records in Health Care Business Case) requires a trustee to notify patients that their medical records will be destroyed if unclaimed for one year.

The proposed amendment to Rule 8001 (Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals) implements the provisions for direct appeals to the courts of appeals that the Act added in 2005.

The proposed amendment to Rule 8003 (Leave to Appeal) provides that a certification by the lower court or the allowance of leave to appeal by the court of appeals satisfies the requirement for leave to appeal, even if no motion for leave to appeal has been filed.

The proposed amendment to Rule 9006 (Time) provides that extensions of time for filing schedules and a statement of financial affairs by a small-business debtor cannot extend beyond the time set in § 1116(3) of the Code.

The proposed amendment to Rule 9009 (Forms) provides 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 proposed amendments to Rules 7012, 7022, 7023.1, and 9024, which were not published for public comment because they are technical and conform to "style" amendments to the Civil Rules that are scheduled to take effect on December 1, 2007. The proposed amendments to the Bankruptcy Rules modify cross-references to the Civil Rules, which were changed during the style project.

Official Form 1 (Voluntary Petition) would be amended to assist the courts in fulfilling the new statistical reporting requirements of 28 U.S.C. § 159. A notice is provided advising the attorney that the attorney's signature constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

Official Form 3A (Application to Pay Filing Fee in Installments) would be amended to state that, until the filing fee is paid in full, the debtor will not make any additional payment or

transfer any additional property for services to an attorney or other person in connection with the case.

Official Form 3B (Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments) would be amended to make minor stylistic changes.

Official Form 4 (List of Creditors Holding 20 Largest Unsecured Claims) would be amended to require that a minor included in the list of creditors be identified only by the minor's initials.

Official Form 5 (Involuntary Petition) would be amended to facilitate collection of statistical information. The proposed revision also requires the disclosure of all aliases used by the debtor during the past eight rather than six years.

Official Form 6, including Schedules A through J, would be amended to: (1) require only the initials of a minor instead of the minor's full name; (2) eliminate the reference to a specific means of valuing property; and (3) make stylistic changes. Schedules I and J of Official Form 6 would be amended to include a statement advising debtors that the income and expense amounts on the schedules may differ from the income and expense amounts listed on the means test forms. The Declaration sheet in Official Form 6 would be amended to clarify the reference to page totals.

Official Form 7 (Statement of Financial Affairs) would be amended to require that a minor be identified by initials instead of full name on the form. The form would also be amended to require the debtor to provide information about part-time employment income and transfers that may be subject to recovery as preferences and fraudulent conveyances. The form would also be amended to reflect extensions of reach-back periods included in the Act's amendments to the Code.

Official Forms 9A through 9I (Notice of Commencement of Case, Meeting of Creditors and Deadlines) would be amended to include only the last four digits of any individual taxpayer-identification number in accordance with Rule 9037. In addition to stylistic changes, the forms would be revised to clarify the references to creditors with foreign addresses.

Official Form 10 (Proof of Claim) would be amended to conform to the changed priority scheme in § 507(a) of the Bankruptcy Code. The amended form would also provide more accurate addresses for transmittal of payments and notices, indicate that a particular proof of claim has been replaced, and update the Instructions and Definitions portions of the form.

Official Form 16A (Caption (Full)) and Official Form 18 (Discharge of Debtor in a Chapter 7 Case) would be amended to require the use of only the last four digits of an individual debtor's taxpayer-identification number.

Proposed Official Form 19 (Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer), replaces Forms 19A and 19B, which are proposed to be abrogated. The new form contains the bankruptcy petition preparer's notice and signed declaration stating that notice was given to the debtor as the Act requires.

Official Form 21 (Statement of Social-Security Number) would be amended to direct a taxpayer who does not have a social-security number to provide a taxpayer-identification number on the form.

Official Forms 22A, 22B, and 22C (Statement of Current Monthly Income and Means-Test Calculation in Chapter 7, 11, and 13 Cases) would be amended to facilitate the completion of the "means test" by individual debtors who contend that their debts are not primarily consumer debts. The forms require the debtor to provide extensive information to determine whether the debtor's filing for relief is presumptively abusive, as mandated by the Act. The information is used to calculate the debtor's current monthly income (CMI), which is the

monthly average of certain income that the debtor received in the six months before the bankruptcy filing. The means test operates by deducting defined allowances set out in IRS national and local standards for living expenses and payment of secured and priority debts and other limited expenses from the CMI, leaving disposable income presumptively available to pay unsecured nonpriority debt. Form 22A governs a chapter 7 case, Form 22B governs a chapter 11 case, and Form 22C governs a chapter 13 case.

Official Form 23 (Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management) would be amended to remind the debtor that the form should not be used to file a certification of prepetition credit counseling.

Official Form 24 (Certification to Court of Appeals by All Parties) would be amended to include a signature line for the appellee and the appellee's attorney.

Proposed new Official Form 25A ([Name of Proponent]'s Plan of Reorganization, Dated [Insert Date]) and Official Form 25B ([Name of Proponent]'s Disclosure Statement, Dated [Insert Date]) provide a model reorganization plan and a form of disclosure statement, which may be used in a small-business chapter 11 case. The forms are illustrative, not mandatory.

Proposed new Official Form 25C (Small Business Monthly Operating Report) assists a small-business debtor in a chapter 11 case fulfill its financial reporting responsibilities under the Act.

Proposed new Official Form 26 (Periodic Report Concerning Related Entities) implements Rule 2015.3, which requires the debtor to provide periodic reports on the profitability of any entities in which a chapter 11 debtor holds a substantial or controlling interest.

The advisory committee recommends that the proposed revisions to Official Forms 25A, 25B, 25C, and 26 take effect on December 1, 2008, because they are tied to proposed rule amendments scheduled to take effect on that date.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

a. Approve the 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, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024 and new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011, 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;

b. Approve the proposed revisions to Bankruptcy Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24 to take effect on December 1, 2007; and

c. Approve the proposed new Bankruptcy Official Forms 25A, 25B, 25C, and 26 to take effect on December 1, 2008.

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

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 4008, 7052, 9006, and 9021, and new Rules 1017.1 and 7058, and proposed revisions to Official Form 8 and a new Official Form 27 with a request that they be published for public comment.

The advisory committee also recommended publishing proposed rule amendments as part of the time-computation project discussed above. The proposed amendment to Rule 9006 is based on the template rule for computing time periods in a consistent way across the federal procedural rules. Changes to the time periods in 39 Bankruptcy Rules are proposed, including Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2,

2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033.

Proposed new Rule 1017.1 establishes procedures for the court to consider a debtor's request to defer prepetition counseling because of exigent circumstances. The proposed amendment to Rule 4008 requires the entity filing a reaffirmation agreement also to file a cover sheet on the applicable Official Form that includes sufficient information for the court to determine whether the proposed reaffirmation agreement is presumed to be an undue hardship for the debtor.

The proposed amendment to Rules 7052 and 9021 and new Rule 7058 account for the amendment of Civil Rule 58 in 2002, which clarifies the time when a judgment that is not set forth on a separate document becomes final for appeal purposes. With some exceptions involving posttrial motions, Civil Rule 58 requires that every judgment be set forth on a separate document and provides a 150-day default appeal period if the requirement is not met. Under proposed new Rule 7058 and amendments to Rule 7052, the separate document requirement and the 150-day default appeal period will apply only to a judgment in an adversary proceeding. They will not apply to a judgment or order in other actions, including contested matters.

The proposed amendment to Rule 7052 clarifies that "entry of judgment" in an adversary proceeding means the entry of a judgment or order under the Bankruptcy Rules, either new Rule 7058 or Rule 9021. New Rule 7058 makes Civil Rule 58, including its separate document requirement and 150-day default appeal period, applicable to adversary proceedings. The proposed amendment to Rule 9021 makes clear that the separate document requirement does not apply outside of adversary proceedings.

The proposed amendments to Official Form 8 require the debtor to provide information on leased personal property and property subject to security interests. Proposed new Official

Form 27 requires the disclosure of financial information necessary for the court to determine whether a reaffirmation agreement creates a presumption of undue hardship for the debtor.

The Committee approved the advisory committee's recommendation to publish the proposed amendments to rules and to Official Forms for public comment.

Informational Items

The advisory committee withdrew a proposed amendment to Rule 5012 (Communication and Cooperation With Foreign Courts and Foreign Representatives), which provides an opportunity for a party 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.

The Act amended the Bankruptcy Code to require attorneys in every chapter 7 case to verify that they have made a reasonable inquiry into the accuracy of court filings submitted by the debtor with the petition, including schedules listing the debtor's assets and liabilities. The advisory committee addressed a "sense-of-Congress" provision in the Act that requests the Judicial Conference to consider amending the rules to apply the same verification requirement to filings by the debtor's attorney or by an unrepresented debtor in every bankruptcy case, not only in chapter 7 cases. An attorney's general responsibilities to review and vouch for the accuracy of papers filed with the court are set out under Rule 9011, the bankruptcy counterpart to Civil Rule 11. It is not clear whether the Act's chapter 7 verification requirements are more or less demanding than the general Rule 9011 requirements that already apply. The advisory committee declined to recommend amending Rule 9011 to apply the Act's chapter 7 verification requirement to all bankruptcy cases. Serious concerns were raised with extending the Act's verification requirement to the often more complex chapter 11 business reorganization cases in which thousands of documents might be filed. The advisory committee also did not believe that it was necessary to amend Rule 9011 to impose special verification requirements on consumer-

debtor attorneys. The Act's chapter 7 verification requirements are self-executing and do not require a rule change. The advisory committee recommended, however, that Official Form 1 be revised to alert consumer-debtor attorneys to the Act's verification requirements.

The advisory committee proposed a revision to Exhibit D to Official Form 1 (Individual Debtor's Statement of Compliance with Credit Counseling Requirement) to ensure that debtors are aware of the prepetition counseling requirement. The revision relates to a rule amendment that is scheduled to take effect in December 2009. The Committee approved the advisory committee's recommendation but decided to defer transmitting it to the Judicial Conference until next year, to coordinate with the pending rule amendment.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

In June 2007, the Standing Committee approved the advisory committee's recommendation to publish for comment proposed amendments to Rule 81 and proposed new Rule 62.1. These will be published in a package with proposed amendments to Rule 8(c), Rule 13(f), Rule 15, and Rule 48 that were previously approved for publication

The advisory committee proposed amendments to additional rules as part of the time-computation project, which is discussed above. The proposed amendment to Rule 6 is based on the template used to compute time periods in a consistent way in each of the sets of procedural rules. Changes to the time periods in 23 Civil Rules and Supplemental Rules are proposed, including Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 59, 62, 65, 68, 71.1, 72, 81, and Supplemental Rules B, C, and G.

The proposed amendment to Rule 8(c) removes "discharge in bankruptcy" from the list of affirmative defenses set out in the rule to make it consistent with changes in substantive law.

The proposed amendment to Rule 13 deletes subdivision (f), which sets out standards for

amending pleadings to add a counterclaim. This subdivision is redundant of Rule 15, which sets out standards governing the amendment of pleadings in general.

The proposed amendment to Rule 15(a) modifies the right to amend once as a matter of course. This proposal eliminates the distinction drawn by present Rule 15(a), under which a responsive pleading immediately cuts off the right to amend, while a Rule 12 motion does not cut off the right. The proposed amendment provides that when a responsive pleading is required, service of a responsive pleading or a motion under Rule 12(b), (e), or (f) cuts off the right to amend 21 days after service.

The proposed amendment to Rule 48 adds a provision similar to that in the corresponding Criminal Rule that allows the court to poll the jury individually on its own and requires a poll at a party's request.

The proposed amendment to Rule 81 clarifies the definition of "state" to include commonwealths, territories, and possessions.

Proposed new Rule 62.1 is based on procedures followed in almost all circuits when a motion is made that the district court cannot grant because an appeal is pending. The proposed new rule makes such a procedure explicit in the rules, providing clarity and consistency. Under the proposal, the district court may defer decision, deny the motion, or state either that it would grant relief if the court of appeals remands or that the motion raises a substantial issue. The proposed new Civil Rule is integrated with the parallel proposed new Appellate Rule 12.1.

The Committee approved the advisory committee's recommendation to publish the proposed amendments and new rules for public comment.

Informational Items

The advisory committee chair agreed to defer a request to publish proposed amendments to Rule 56 for public comment. The agenda of the Committee's meeting was full and did not

allow sufficient time to discuss this proposal. The advisory committee intends to bring up the proposed amendments at the Committee's January 2008 or June 2008 meeting.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and rules (with the exception of a technical amendment to Rule 45) were circulated to the bench and bar for comment in August 2006. The advisory committee held a public hearing on the proposed changes in Washington, D.C. and heard testimony from several witnesses.

The proposed amendments, with the exception of proposed amendments to Rules 41 and 45, implement various provisions in the Crime Victims' Rights Act (18 U.S.C. § 3771). During the public comment period, the proposed amendments were criticized both for going too far and for not going far enough. Those who believed that the proposed amendments went too far raised the concern that they upset the rules' careful procedural framework, tipping the adversarial balance between the prosecution and the defendant and depriving the defense of critical rights. Some asserted that certain of the proposed amendments tipped the balance so far as to be unconstitutional. Others, including Senator Kyl, who was the Act's chief sponsor, asserted that the advisory committee did not fully implement the Act. The committee proposed rule amendments to implement the specific rights recognized in the Act. The committee did not propose a number of other amendments to many rules to provide specific rights in particular proceedings, not expressly stated in the Act but based on the Act's general right that crime victims be treated fairly and with respect.

As a threshold matter, the advisory committee discussed whether any of the criminal procedural rules should be amended to set out the statutory rights provided in the Crime Victims' Rights Act. Federal procedural rules generally do not repeat statutory provisions. First, it is unnecessary; a rule containing statutory substantive provisions cannot alter or add force to those statutory provisions. The Crime Victims' Rights Act is self-executing. Additionally, there are disadvantages to having the procedural rules repeat statutory provisions. Any future amendment of the underlying statute will make the parallel rule inconsistent and cause confusion until a corresponding change in the rule is promulgated, which is a deliberate and slow process. The inevitable language differences between a statute and a procedural rule create inconsistency and confusion that may generate litigation. The advisory committee recognized these concerns but concluded that carefully drafted rule amendments to implement the specific rights set out in the Act would be appropriate and helpful.

The advisory committee declined, however, to amend the vast majority of rules to include additional rights. The committee carefully reviewed proposals that would have amended a large number of individual rules to provide rights not expressly stated in the Act, based on the crime victims' general right to be treated fairly and with respect. The advisory committee concluded that such proposals would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act.

The advisory committee was concerned that such proposals not only could create new substantive rights, they would change the rules in very detailed ways without a sufficient basis to do so. There is as yet little case law or judicial experience interpreting and applying the Act to specific cases and facts. Basing specific rules amendments on general statutory language, without the customary and important guidance provided by judges interpreting and applying the

statute to a developed record, is premature and invites error. The advisory committee was concerned that comprehensive rule changes made now, spelling out how this generally stated statutory right is to be implemented in particular proceedings, would freeze the jurisprudence into rigid requirements. Such requirements could hamper rather than help judges provide additional procedural protections that might be needed in individual cases. To make such sweeping, yet detailed, rules changes in the absence of guidance from experienced district judges around the country would have substituted the premature judgment of the rules committees for that of the judges charged with ensuring that the rights of defendants, the prosecution, and crime victims are protected in every case.

In addition, these proposals would have the potential of micro-managing judges in exercising their judgment in individual cases. To a large extent, the federal procedural rules have functioned effectively because they rely on the practical experience and wisdom of federal judges to carry out their duties without such detailed instructions.

Without a sound empirical basis, without guidance from judges and litigants who have applied the Act to different circumstances, and without guidance from victims and their representatives who have had actual experience in federal court under the Act, the advisory committee decided to defer taking action on these numerous other proposals for rule amendments based on the general statutory language. The committee intends to: (1) gather more information on precisely how the proposals would operate in specific proceedings and what effects they might have; (2) obtain empirical data substantiating the existence and nature of problems that could be addressed by rule; and (3) provide additional time for courts to acquire experience under the Act and to develop case law construing it.

The advisory committee proposed the following amendments to implement the specific rights set out in the Act. The proposed amendment to Rule 1 incorporates the Act's definition of

"crime victim" into the rules. The Committee Note to the rule makes clear the court's authority to decide any dispute as to who is a victim in a particular case.

The proposed amendment to Rule 12.1 prevents automatic disclosure to the defense of a crime victim's address and telephone number when an alibi defense is raised and the government intends to rely on the victim's testimony to establish the defendant's presence at the scene of the alleged offense. The amended rule requires the defendant to establish a need to obtain the information. After the need has been established, the amendment authorizes the court to "fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests."

The proposed amendment to Rule 17 requires for the first time a court order before a subpoena can be issued to a third party to obtain personal or confidential information concerning a victim. The proposed amendment requires that the victim be notified of such a request unless exceptional circumstances are shown to the court. The Committee Note provides examples of exceptional circumstances, including situations where evidence might be lost or destroyed without immediate action, or where providing notice would unfairly prejudice the defense by prematurely disclosing sensitive defense strategy.

Rule 18 would be amended to require a court to consider a victim's convenience, as well as the convenience of the defendant and witnesses, in setting the place of trial.

Several changes are proposed to Rule 32, including adopting the more expansive definition of "crime victim" used in amended Rule 1. The new term applies to all crime victims, not only to a victim of a crime of violence or sexual abuse, as previously defined in the rule. The proposed amendment makes it clear that the presentence investigation should include information pertinent to restitution whenever the law permits the court to order restitution, not only when it requires restitution. A provision was also added to incorporate the Act's language

that a victim has the right "to be reasonably heard" in judicial proceedings regarding sentencing. The Committee Note states that absent unusual circumstances, any victim who is in the courtroom should be allowed a reasonable opportunity to speak directly to the judge.

The last amendment addressed to victims' rights, proposed new Rule 60, gathers in one rule a number of crime victims' rights. Existing Rule 60 would be renumbered as Rule 61, and an entirely new rule focused on crime victims' rights is proposed as a substitute. Proposed new Rule 60 incorporates several provisions of the Act. The new rule provides that: (1) the government must use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime; (2) the court must not exclude a victim from public court proceedings involving the crime unless there is evidence that the victim's testimony would be changed if allowed to hear the testimony; (3) the victim has the right to be reasonably heard at any public hearing on release, plea, or sentencing; and (4) the court must promptly decide any motion asserting a victim's rights, which may be raised by the victim or the victim's legal representative in accordance with the Act.

The proposed amendment to Rule 41 authorizes a magistrate judge in a district in which activities related to a crime may have occurred, or in the District of Columbia, to issue a search warrant for property located outside any state or federal judicial district but within a United States territory, possession, or commonwealth or within certain premises associated with United States diplomatic and consular missions. The amendment responds to a problem that affects investigations of cases involving corruption in United States embassies and consulates around the world. Under the current rules, magistrate judges are not provided the authority to issue warrants for such locations. The proposed amendment was deliberately limited to specified locations to avoid thorny international issues, which defeated a broader proposal recommended in 1990.

The Pacific Islands Committee of the Judicial Council of the Ninth Circuit requested the advisory committee to consider deferring application of the rule to American Samoa until the local judiciary could study and comment on the proposal. The advisory committee received no comments on the proposal from the American Samoan judiciary during the six-month public comment period. Meanwhile, the Department of Justice urged the advisory committee to include American Samoa in the rule to facilitate ongoing criminal investigations that the current rules were hampering. The advisory committee decided to include American Samoa in the proposed amendment to Rule 41.

The proposed amendment to Rule 45 corrects a cross-reference to Civil Rule 5, which was renumbered as part of the general restyling of the Civil Rules. The amendment is technical and was not published for comment.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

Approve the proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61, 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 Criminal Procedure are in Appendix B with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under §§ 2254 and 2255 with a request that they be published for public comment.

The advisory committee proposed amendments to additional rules as part of the time-computation project, which is discussed above. The proposed amendment to Rule 45 is based on the template rule used to calculate time periods in a consistent way in the federal procedural

rules. Changes to the time periods in 14 Criminal Rules and §§ 2254 and 2255 Rules are proposed, including Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under §§ 2254 and 2255.

The proposed amendment to Rule 7 deletes, as unnecessary, a forfeiture-related provision that is more appropriately set out in Rule 32.2.

The proposed amendment to Rule 32 provides that a presentence report should state whether the government is seeking forfeiture to promote timely consideration of issues concerning forfeiture as part of the sentencing.

The proposed amendments to Rule 32.2: (1) state that the government's notice of forfeiture should not be designated as a count in an indictment or information and that the notice need not identify the specific property or money judgment that is subject to forfeiture; (2) require the court to enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications; (3) expressly authorize a court to enter a forfeiture order that is general in nature in a case in which it is not possible to identify all of the property subject to forfeiture; (4) clarify when the forfeiture order becomes final as to the defendant, state what the district court is required to do at sentencing, and require the government to submit a special verdict form; and (5) provide technical changes modifying the notice, publication, and interlocutory sale of property subject to forfeiture.

The proposed amendment to Rule 41 expressly applies the rule's warrant provisions to the search of electronically stored information. It sets up a two-stage process, authorizing the seizure of electronic storage media or the seizure and copying of electronically stored information and a subsequent review of the storage media or electronically stored information consistent with the warrant. Under the amendment, the inventory describing the electronically

stored information may be limited to a description of the physical storage media seized or copied.

The proposed amendments to Rule 11 of the Rules Governing Proceedings under §§ 2254 and 2255 make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the pertinent Rule 11. The amendments also require the district judge to grant or deny the certificate at the time a final order is issued.

The Committee approved the advisory committee's recommendation to publish the proposed amendments to rules for public comment.

Informational Items

The Committee declined to approve the advisory committee's recommendation that Rule 16 be amended to codify and expand the *Brady* requirements that prosecutors disclose exculpatory information to the defense. Several Committee members expressed concern about the breadth and consequences of the proposed amendment. Some of the concerns were that it could impose broad new obligations on the prosecution to disclose potential impeachment materials and create uncertainty about the standards and burdens for setting aside convictions. The Committee recommended that additional empirical data and study be obtained about the potential impact of the proposal, including study into districts' local rules that state *Brady* obligations. In addition, the Committee wanted to obtain information about the experience with the Department of Justice's recent revisions to its *U.S. Attorneys' Manual* expanding the statement of prosecutors' obligations to provide potentially exculpatory information to defendants.

The advisory committee declined to move forward with a proposed amendment to Rule 29, which would have prohibited a judge from entering a nonreviewable judgment of acquittal before the jury verdict. Though the Department of Justice urged amendment of the rule to

subject such judgments to appellate review, the advisory committee concluded that the rule provides needed flexibility to judges in multiple-defendant and multiple-count cases.

FEDERAL RULES OF EVIDENCE

Rule Approved for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed new Rule 502 with a recommendation that it be approved and transmitted to the Judicial Conference. The advisory committee proposed Rule 502 after the chairman of the House Judiciary Committee requested the Judicial Conference to undertake the rulemaking process to address concerns about privilege waivers. Unlike other proposed rule changes, under the Rules Enabling Act an amendment affecting an evidentiary privilege requires Congress to adopt the rule by affirmative act. (28 U.S.C. § 2074(b).)

The advisory committee held a conference at Fordham Law School with a select group of practitioners and academics to review a draft rule in April 2006. Appropriate changes were made to the draft to account for the suggestions and comments raised at the conference. The revised proposed rule was published for comment from the bench and bar in August 2006. The advisory committee held two public hearings on the proposed new rule at which numerous witnesses testified.

The proposed new rule facilitates discovery and reduces privilege-review costs by limiting the circumstances under which the privilege or protection is forfeited, which may happen if the privileged or protected information or material is produced in discovery. The burden and cost of steps to preserve the privileged status of attorney-client information and trial-preparation materials can be enormous. Under present practices, lawyers and firms must thoroughly review everything in a client's possession before responding to discovery requests. Otherwise they risk waiving the privileged status not only of the individual item disclosed but of

all other items dealing with the same subject matter. This burden is particularly onerous when the discovery consists of massive amounts of electronically stored information.

The proposed new rule is intended to reduce the risk of forfeiting the privilege or protection so that parties need not scrutinize information produced in discovery as much as they now do, in order to reduce the burden, cost, and time such scrutiny requires. The proposed rule does not affect the substantive law of privileges, which continues to be governed by common law in federal courts.

Proposed new Rule 502 contains four main provisions. The first codifies the majority view and protects a party from waiving a privilege if privileged or protected information is disclosed inadvertently in a federal court proceeding or to a federal public office or agency, unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return. The second protects a party from waiving a privilege covering all documents dealing with the same subject matter as a document that was disclosed, unless fairness requires such an extreme result. The third protects a party from waiving a privilege or protection if the court enters an order providing that disclosure of privileged or protected information does not constitute a waiver. The order is enforceable against all persons in any federal or state proceeding. The fourth provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding, binding only the parties.

If there is a disclosure of privileged or protected information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings. If there is a disclosure of privileged or protected information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver. As a practical matter, the proposed rule is consistent with the laws of most jurisdictions because a

large majority of state and federal courts have rules or statutes that protect against waiver. But a handful of jurisdictions do not follow the majority view and waive the privilege if the information was inadvertently disclosed, regardless of the care taken to protect against disclosure. Absent a rule that provided protection against waiver in all jurisdictions, like proposed Rule 502, a careful party would have to continue to scrutinize all documents being disclosed – with the attendant cost, burden, and delay – rather than risk forfeiting the privilege in a later law suit in one of the outlier jurisdictions.

At the suggestion of the House Judiciary Committee chair, the advisory committee also considered a rule that would allow persons to cooperate with government agencies and disclose privileged information without waiving the right to assert privilege as to other parties in subsequent litigation. The provision is controversial and is the subject of pending legislation. After careful review of the competing interests involved in "selective waivers," the advisory committee determined that it would not recommend this provision. Unlike inadvertent waivers, which raise the costs and burdens of the discovery phase of litigation, an area of great concern to the rules committees, the selective waiver provision addresses policy matters, principally the effectiveness of government investigations, that are largely outside the competence and jurisdiction of the rules committees.

Any rule creating, establishing, or modifying an evidentiary privilege requires legislation. Consequently, the advisory committee recommended that proposed Rule 502 be transmitted directly by the Judicial Conference to Congress for its consideration with a recommendation that it adopt the rule.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

Approve proposed new Evidence Rule 502, and transmit it to Congress with a recommendation that it be adopted by Congress.

The proposed amendments to the Federal Rules of Evidence are in Appendix C with an excerpt from the advisory committee report.

Report to Congress on Marital-Communications Privilege

The Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248) requires the "Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States [to] study the necessity and desirability of amending the federal rules of evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse; or (2) a child under the custody or control of either spouse."

With the exception of a single case, all courts that have considered the issue have already adopted an exception to the marital privileges for cases in which the defendant is charged with harming a child in the household. The single federal case that refused to adopt a harm-to-child exception to the adverse testimonial privilege is dubious authority, because its sole expressed rationale is that no court had yet established a harm-to-child exception, even though reported cases do in fact apply a harm-to-child exception in identical circumstances – including a previous case in the court's own circuit. The advisory committee decided not to recommend a rule amendment to respond to the aberrational decision that is not even controlling authority in its own circuit. Such an amendment is not only unnecessary but would also raise the following problems: (1) piecemeal codification of privilege law; (2) codification of an exception to a rule of privilege that is not itself codified; (3) difficulties in determining the scope of such an

exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and (4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The advisory committee submitted a report as directed by the legislation setting out the reasons for its recommendation not to propose a rule. The report included draft language in the event Congress decided to move forward on the proposal.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

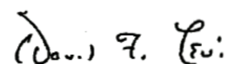
Approve sending the report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges to Congress.

The report is in Appendix D.

LONG-RANGE PLANNING

The Committee was provided a report of the March 12, 2007, 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	Daniel J. Meltzer
Ronald M. George	Patrick J. McNulty
Harris L Hartz	James A. Teilborg
John G. Kester	Thomas W. Thrash

Appendix A – Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Appendix B – Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix C – Proposed Amendments to the Federal Rules of Evidence
Appendix D – Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges