SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendment to Supplemental Rule C(6)(a) and transmit this change to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. . . . . p. 5

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

Agenda E-19
Rules
March 2007

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 January 11-12, 2007. Joan E. Meyer, Senior Counsel to the Deputy Attorney General, attended the meeting on behalf of Deputy Attorney General Patrick J. McNulty. All the other 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, Joseph F. Spaniol, and Professor Geoffrey C. Hazard, consultants to the Committee. Also in attendance were Chief Justice Charles Talley Wells, Judge J. Garvan Murtha, and Professor Mary Kay Kane, former members of the Committee, whose terms expired on October 1, 2006. Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules, Patricia Lee Refo, former member of the Advisory Committee on Evidence Rules, Justice Andrew D. Hurwitz, member of the Advisory Committee on Evidence Rules, and Professor Stephen C. Yeazell of the School of Law at the University of California at Los Angeles participated in a panel discussion on the impact of rule amendments on the decline in the number of civil case trials.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action.

Informational Item

The advisory committee approved in principle amendments to Rule 4(a)(4)(B)(ii) and Rule 29. 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 prior notice of appeal in a case when the district court amends the judgment after the notice of appeal has been filed. The proposed amendment to Rule 29 is modeled on Supreme Court Rule 37.6. It 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. The advisory committee continues to refine the language of both amendments and plans to request that they be published for public comment at a later date.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 7052 and 9021, and new Rule 7058. The proposed changes to the Bankruptcy Rules account for the amendment of Civil Rule 58 in 2002, clarifying the time when a judgment that is not set forth on a separate document becomes final for appeal purposes. With some exceptions involving post-trial 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 judgment is not set forth on a separate document. Under the proposed new bankruptcy rule and amendments, 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 Rule 7058 or new 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 in a non-adversary proceeding.

Several minor drafting suggestions were offered to clarify the proposed amendments. The Committee voted to approve the proposed amendments in principle and allow the advisory committee to refine the language before publishing them for public comment in August 2007.

Informational Items

Proposed amendments to 32 rules and 20 Official Forms, together with 8 new rules and 5 new forms, were circulated to the bench and bar for comment in August 2006. Most of the

proposed amendments and new rules are based on the Interim Rules, which virtually all courts adopted without change by local rule or general order in August 2005 to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "2005 Bankruptcy Act" – Pub. L. No. 109-8). Although the new and amended forms took effect in late 2005, they were also published to give the public an opportunity to comment, which could not be provided earlier because the Act allotted too little time to promulgate forms under the regular rulemaking process. The scheduled public hearing on the proposed amendments was cancelled because no one requested to testify. At its March 29-30, 2007, meeting, the advisory committee will consider the written comments submitted on the proposed amendments.

The 2005 Bankruptcy Act amended the law 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, 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 every bankruptcy case, not only to chapter 7 cases. The advisory committee is considering whether to propose amending Rule 9011, the bankruptcy counterpart to Civil Rule 11, to apply the verification requirement not to all bankruptcy cases, but to all consumer-related bankruptcy filings, including chapter 13 cases, which can be converted from chapter 7 cases. Serious concerns were raised with extending the verification requirement to the often more complex chapter 11 business reorganization cases in which thousands of documents might be filed. The advisory committee plans to make a final recommendation on this subject at its March 2007 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to Supplemental Rule C(6)(a) with a recommendation that it be approved without publication and transmitted directly to the Judicial Conference. The amendment addresses an inadvertent drafting omission made when the rule was amended in December 2006. The amended rule did not capitalize the first word of a new subparagraph. The proposed technical amendment to Rule C(6)(a) corrects this minor drafting problem, avoiding potential confusion and making the subparagraph more parallel with other provisions. Under the governing Judicial Conference rulemaking procedures, notice and public comment on a proposed rule amendment are not required if it is determined that they are not appropriate or necessary. The advisory committee concluded that public comment was unnecessary.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Supplemental Rule C(6)(a) and transmit this change to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to Supplemental Rule C(6)(a) is in Appendix A with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 13(f), 15, and 48 with a recommendation that they be published for comment.

Under the proposed amendment to Rule 13, subdivision (f), which sets out standards governing the amendment of a counterclaim, is deleted because it is largely redundant of Rule 15, which sets out standards governing the amendment of pleadings in general. With the deletion

of subdivision (f), Rule 15 will provide a uniform standard in a single rule governing all pleadings, including amendment of claims, crossclaims, and counterclaims. Courts have not applied different standards to the amendment of these pleadings, nor is there any good reason to treat them differently. The Committee approved the advisory committee's recommendation to publish the proposed amendment for public comment.

Rule 15 would be amended to clarify when a pleading may be amended as a matter of course, without the need to obtain leave of court. The changes to Rule 15 would cut off the right to amend a pleading once as a matter of course 21 days after a motion challenging the pleading is filed (e.g., a Rule 12(b)(6) motion) or 21 days afer a responsive pleading is served (e.g., an answer). As under the present rule, a party may request the court for leave to amend a pleading at any time.

Under the current rule, a party may not amend a pleading as a matter of course after a responsive pleading has been served, but a party may amend a pleading as a matter of course at any time after a responsive motion is served. As a result, an amended pleading can be filed during the time when a judge is deliberating on a responsive motion, frustrating or complicating the judge's efforts to rule on the motion. The definite deadlines imposed under the proposed changes limit the time to file a pleading amendment as a matter of course, while providing sufficient time to amend a pleading to address problems raised in a responsive pleading or motion. Concern was expressed that in those few cases in which a motion to dismiss is filed after an answer, providing a party 21 days to amend a pleading as a matter of course after a responsive pleading is served might encourage sloppy pleading, or the provision might be used as a ploy to obtain the benefit of the opponent's legal research to improve the pleading so that it can withstand dismissal. The Committee concluded that the potential for mischief was small, and it approved – with one dissenting vote – the advisory committee's recommendation to publish the

proposed amendment. The advisory committee will invite comment on the question raised in the discussion.

The amendment to Rule 48 adds a provision requiring a court to poll the jury individually at the party's request, or, alternatively, the court may do so on its own. The proposal is modeled on the jury-polling provision in Criminal Rule 31(d). The Committee approved the advisory committee's recommendation to publish the proposed amendment for public comment.

Informational Items

The advisory committee continues to refine the language of a proposed new Rule 62.1. It establishes procedures facilitating the remand of certain postjudgment motions filed after an appeal has been docketed in a case in which the district court indicates that it would grant the motion. The proposed procedure recognizes the efficiencies of existing appellate-court practices in remanding a postjudgment motion in a case in which the motion's resolution is more appropriately handled by the district court. The Advisory Committee on Appellate Rules will study the desirability of proposing an Appellate Rule that would integrate with the proposed rule.

The advisory committee is considering proposed amendments to Rule 26(a)(2)(B) to address several issues dealing with expert witness reports, including: (1) identifying which experts must provide a report; (2) determining whether privileged information may be omitted from disclosure in the expert witness report; and (3) determining whether "drafts" of expert witness reports are subject to discovery. The advisory committee is also considering proposed amendments to Rule 56 that would better reflect modern summary-judgment practices.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action.

Informational Items

Proposed amendments to Rules 1, 12.1, 17, 18, 29, 32, 41, and new Rule 43.1 were circulated to the bench and bar for comment in August 2006. One of the two scheduled public hearings on the proposed amendments was cancelled. The two witnesses requesting to testify at the cancelled hearing agreed to testify at the other scheduled hearing; one witness testifying in person and the other witness testifying via teleconference call. At its April 2007 meeting, the advisory committee will consider the witnesses' testimony and written comments submitted on the proposed amendments.

The advisory committee voted to reexamine the proposed amendment to Rule 32(h), which the Committee returned in June 2006 for further study in light of recent case-law developments and concerns about its application. The amendment was designed to avoid unfair surprise and to give the parties an opportunity to be heard by requiring a court to give notice if it is considering a non-guideline sentence based on a factor in 18 U.S.C. § 3553(a) that was not identified in the presentence report or prehearing submissions. The advisory committee will review the recent case-law developments, and it will focus on the precise elements constituting adequate notice during its reexamination of the proposed amendment.

At the Committee's request, the advisory committee also considered concerns raised by the Committee on Court Administration and Case Management (the "CACM Committee") on new Rule 49.1, which implements the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), governing electronic filings in court. The CACM Committee suggested that the name of the grand jury foreperson be redacted from indictments and that identifying personal information be redacted from search and arrest warrants filed with the court.

After reviewing its records and surveying U.S. attorneys' offices and the U.S. Marshals Service, the Department of Justice identified a very small number of reported incidents involving

a threat against a petit or grand juror during a four-year period. The records of threats or inappropriate contacts did not distinguish between petit and grand jurors nor identify grand jury forepersons. One incident was reported in FY 2003, two in FY 2004, and none in FY 2005. There were 18 incidents reported in FY 2006, but 16 of them involved a single case in Nevada. The advisory committee concluded that the available data did not support an amendment to the rule. Moreover, an amended rule would have little practical effect, because it could not prevent the defendant, presumably the main source of threats to juries, from acquiring access to the grand jury foreperson's name. Furthermore, the present rule authorizes a court to redact the grand jury foreperson's name in individual cases if the court concludes that the foreperson's safety might otherwise be jeopardized.

The advisory committee continues to study the CACM Committee's suggestion to redact personal identifying information from arrest and search warrants. Several members expressed concerns about restricting the public's right to this information, and the Department of Justice asserted that the addresses of premises to be searched in a warrant are essential to law enforcement officers.

The advisory committee approved a proposed amendment to Rule 16, codifying and expanding *Brady* obligations imposed on prosecutors to disclose exculpatory information to the defense. The Department of Justice revised its *U.S. Attorneys' Manual* to accomplish much the same goals, in lieu of a rule change. Nonetheless, the advisory committee concluded that a rule change was necessary because the *Manual* is not judicially enforceable and provides only internal guidance. The advisory committee expects to submit the proposed amendment to Rule 16 with a recommendation to publish it along with a comprehensive report explaining its reasons for the Committee's consideration at its June 2007 meeting. The Committee chair noted concerns that the proposed amendment's expansive wording would impose an unmanageable burden on the

prosecution to disclose potentially relevant impeachment materials. Also, the proposed amendments could lead to uncertainty involving the standards and burdens for setting aside convictions on appeal. He urged the advisory committee to reexamine the proposed amendments and simultaneously to review the experiences of the courts who have local rules on the same subject.

The advisory committee is considering a new Rule 37 to regularize collateral review procedures, including: (1) providing that the writ of coram nobis is available only to persons not in custody; (2) subjecting coram nobis to timing limitations similar to those applicable to habeas corpus actions; and (3) providing that the other ancient writs (coram vobis, audita querela, bills of review, and the bills in the nature of bills of review) are not available in criminal proceedings. Concerns were raised about limiting some of the ancient writs, and the advisory committee continues to study whether any substantive rights might be lost if any of the ancient writs were limited.

The advisory committee is also studying possible amendments to Rule 41 to clarify procedures governing the search and seizure of electronically stored information.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Informational Items

A proposed new Rule 502, dealing with waiver of evidentiary privileges, was circulated to the bench and bar for comment in August 2006. Unlike other proposed rule changes, an amendment affecting an evidentiary privilege requires the affirmative approval of Congress under the Rules Enabling Act rulemaking process (28 U.S.C. § 2074(b)). The advisory committee proposed Rule 502 after Congressman F. James Sensenbrenner, then chairman of the

House Judiciary Committee, requested the Judicial Conference to undertake the rulemaking process to address concerns raised about the waiver of privileges. The advisory committee held two public hearings on the proposed new rule at which numerous witnesses testified. At its April 12-13, 2007, meeting, the advisory committee will consider the testimony and written comments submitted on the proposed rule.

The advisory committee continues to work on a report required by Congress 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" (Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248)). With the exception of a single case, all courts that have considered the issue have adopted an exception to the protections provided by the marital privilege for cases in which the defendant is charged with harming a child in the household. The advisory committee preliminarily decided not to recommend an amendment to the rules, and it is preparing a proposed report to Congress for the Committee and the Judicial Conference to consider. The report will set out the reasons for the recommendation and will include proposed language for an amendment should Congress decide to proceed.

VANISHING TRIALS PRESENTATION

Patricia Lee Refo presented statistical data vividly showing the significant decline in the number of trials held in civil cases. She also noted that the American Bar Association is very concerned with this phenomenon. Judge Higginbotham suggested that there are many reasons for the decline in the number of trials held in federal court and that no single cause is apparent. He observed, however, that federal courts over the past 50 years have been steadily moving toward an "administrative model of dispute resolution" that favors settlement, summary

judgments, practice on the pleadings, and references to arbitrators, all of which serve to avoid trials. Justice Hurwitz noted that as the cost of litigation increased, it has become less practical to try cases involving relatively small financial disputes, thereby eliminating a primary source of trial experience for lawyers. With less experience, lawyers feel less comfortable with trying more substantial cases and more comfortable with settling them. Professor Yeazell noted that state courts are experiencing a similar decline in civil trials. The panel members agreed that the decline in civil trials has reduced the opportunities for citizens to participate in the justice system, which may have long-term adverse effects on the judiciary. But it was the panel's consensus that the federal rules had minimal, if any, impact on the decline.

TIME-COMPUTATION PROJECT

The Committee's subcommittee reported on its progress in clarifying and simplifying the time-computation provisions contained in the various sets of federal procedural rules. A draft general rule governing computation of time periods for use in each set of procedural rules was nearly final. The respective advisory committees reported on their progress in reviewing time periods contained in individual rules and determining whether any changes in them were necessary to account for the proposed general rule governing time computation. It is expected that the advisory committees will be in a position to recommend proposed amendments accounting for the general time-counting rule at the June 2007 Committee meeting. Although prepared to proceed on amendments to approximately 60 rules containing time periods, the Advisory Committee on Bankruptcy Rules is considering delaying publication of these proposals at this time to allow the bench and bar sufficient time to become familiar with the many new amendments implementing the 2005 Bankruptcy Act before transmitting another large set of amendments. The advisory committee was also concerned that publishing the time-counting amendments at the same time that the amendments implementing the Act were being finalized

would generate confusion, especially because the amendments affect many of the same rules. The Committee shared the advisory committee's concerns.

COMMITTEE SELF-EVALUATION AND ACCESS TO INFORMATION

At the Executive Committee's request, the respective advisory committees and the Committee reviewed their jurisdictional statements and concluded that they should continue to exist. The committees also submitted written responses to questions about access to Judicial Conference committee agenda materials, reports, and other related information.

LONG-RANGE PLANNING

The Committee was provided a report of the September 18, 2006, meeting of the Judicial Conference's committee chairs involved in long-range planning.

Respectfully Submitted,

David F. Levi

David J. Beck	Mark R. Kravitz
Douglas R. Cox	William J. Maledon
Sidney A. Fitzwater	Daniel J. Meltzer
Ronald M. George	Patrick J. McNulty
Harris L Hartz	James A. Teilborg
John G. Kester	Thomas W. Thrash

Appendix A – Proposed Amendment to the Federal Rules of Civil Procedure

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

To: Honorable David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Lee H. Rosenthal, Chair
Advisory Committee on Federal Rules of Civil Procedure

Date: December 12, 2006

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Vanderbilt Law School in Nashville, Tennessee, on September 7 and 8, 2006.

* * * * *

Part I presents a technical amendment to Supplemental Rule C(6)(a) with a recommendation that it be approved without publication for comment, because it is a technical amendment.

Part II of this report presents items recommended for approval for publication next summer. These items are proposed amendments to Rules 13(f) and 15(a) on amending pleadings and to Rule 48 on jury polling, along with a proposed new Rule 62.1 on "indicative rulings"that addresses the authority of a district court to act on certain requests for relief after notice of appeal is filed. These were introduced in summary form as information items at the June 2006 meeting but with the recommendation that in light of other recent and anticipated amendments, publication would be in August 2007.

Part III briefly summarizes the Advisory Committee's discussion of the intercommittee time-computation template rule. This part also summarizes the Advisory Committee's considerable progress in the intracommittee work of reviewing the time periods and deadlines within the Civil Rules and recommending amendments to be consistent with the template and to be sure the periods and deadlines are reasonable. These amendments will be recommended for publication in tandem with the template rule.

Part IV presents several items for information. These include projects being developed by subcommittees, one focusing on discovery and the other focusing on summary judgment and the possibility of developing a court-controlled procedure for requiring more specific pleading on an individual-case basis. Another project that has been less developed arises from a Second Circuit suggestion for amending Rule 68 on offers of judgment. Finally, submission of the Style Project to the Supreme Court is noted.

I. Action Item: Recommendation For Adoption Without Publication

The Advisory Committee recommends approval for adoption without publication of a technical amendment to Supplemental Rule C(6)(a)(I).

Adoption of Supplemental Rule G, which took effect on December 1, 2006, required conforming amendments that withdrew portions of other Supplemental Rules that dealt with civil forfeiture proceedings. An unintended omission failed to capitalize "A" as the first word of subparagraph C(6)(a)(i). The omission might be cured by simply capitalizing "A," but a better parallel with subdivisions C(1), (2), and (5) can be achieved by these changes:

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) ~~Maritime Arrests and Other Proceedings~~ Statement of Interest; Answer. In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

* * * * *